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The Free Jammie Movement: Is Making a File Available to Other Users Over a Peer-to-Peer Computer Network Sufficient to Infringe the Copyright Owner's 17 U.S.C. § 106(3) Distribution Right?

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The Free Jammie Movement: Is Making a File Available to Other Users Over a Peer-to-Peer Computer Network Sufficient to Infringe the Copyright Owner's 17 U.S.C. § 106(3) Distribution Right?

Cover Page Footnote

Thank you to Jay, my inspirational son who was born during the process of writing this Note, and thank you to Ting, my inspirational wife who did not divorce me during the process of writing this note.

THE FREE JAMMIE MOVEMENT: IS MAKING A FILE AVAILABLE TO OTHER USERS OVER A PEER-TO-PEER COMPUTER NETWORK SUFFICIENT TO INFRINGE THE COPYRIGHT OWNER'S 17 U.S.C. § 106(3) DISTRIBUTION RIGHT?

Ken Nicholds*

Of the thousands of lawsuits brought by the Recording Industry Association of America against individuals for sharing music files over the Internet, the case of Jammie Thomas-Rasset was the first to complete a full jury trial. The judge vacated the initial judgment against Thomas-Rasset because he found, sua sponte, that he was mistaken when he instructed the jury that making a file available over a computer network for others to download is sufficient to find infringement of the exclusive distribution right of the copyright owner under 17 U.S.C. § 106(3). This Note argues that there is no making-available right, but that making-available may be considered as circumstantial evidence of distribution.

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INTRODUCTION: ON THE INTERNET, THE CULTURE IS FREE

The internet is a copy machine. . . . The digital economy is thus run on a river of copies. Unlike the mass-produced reproductions of the machine age, these copies are not just cheap, they are free.¹

The Recording Industry Association of America (RIAA),² representing the major music record labels, knows this all too well. Napster brought the transfer of files over a computer network between individuals (filesharing)

1. Kevin Kelly, *Better Than Free*, EDGE, Feb. 5, 2008, http://www.edge.org/3rd_culture/kelly08/kelly08_index.html.

2. See Recording Industry Association of America—Who We Are, <http://riaa.org/aboutus.php> (last visited Oct. 19, 2009) ("The Recording Industry Association of America (RIAA) is the trade group that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes our members' creative and financial vitality. Its members are the record companies that comprise the most vibrant national music industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate sound recordings produced and sold in the United States.").

to the mainstream in 1999,³ and the music industry took note. As technology advances and becomes cheaper, the Motion Picture Association of America (MPAA),⁴ representing the major movie studios, also fears for the survival of its industry. In contrast, the Electronic Frontier Foundation (EFF),⁵ declaring that it “champion[s] the public interest in every critical battle affecting digital rights,”⁶ fears for the survival of “free speech, privacy, innovation, and consumer rights today.”⁷

In the middle of this tussle, in Duluth, Minnesota, is Jammie Thomas-Rasset, a single mother with limited funds who claims that she did not distribute music files over the Internet.⁸ A jury found her liable for copyright infringement, but the judge vacated the judgment.⁹ He explained that he erred when he instructed the jury that making a music file available over a computer network for others to download is sufficient to find copyright infringement.¹⁰ Within the context of the *Thomas* case, this Note addresses whether making a file available to other users over a peer-to-peer computer network is sufficient to infringe the copyright owner’s 17 U.S.C. § 106(3) distribution right. In other words, this Note analyzes whether an owner’s exclusive distribution right extends to making the copyrighted work available to others, i.e., whether there is a making-available right.

There has been extensive online criticism of the making-available right.¹¹ This is at least in part due to the culture of the Internet. The Internet was built with a culture that encourages sharing for free. Today, even traditional

3. See Spencer E. Ante, *Inside Napster*, BUSINESSWEEK, Aug. 14, 2000, at 112.

4. See Motion Picture Association of America, About Us, <http://www.mpa.org/AboutUs.asp> (last visited Oct. 19, 2009) (“The Motion Picture Association of America (MPAA) and its international counterpart, the Motion Picture Association (MPA) serve as the voice and advocate of the American motion picture, home video and television industries, domestically through the MPAA and internationally through the MPA. Today, these associations represent not only the world of theatrical film, but serve as leader and advocate for major producers and distributors of entertainment programming for television, cable, home video and future delivery systems not yet imagined.”).

5. See About EFF, Electronic Frontier Foundation, <http://www.eff.org/about> (last visited Oct. 19, 2009) (“When our freedoms in the networked world come under attack, the Electronic Frontier Foundation (EFF) is the first line of defense. EFF broke new ground when it was founded in 1990—well before the Internet was on most people’s radar—and continues to confront cutting-edge issues defending free speech, privacy, innovation, and consumer rights today. From the beginning, EFF has championed the public interest in every critical battle affecting digital rights. Blending the expertise of lawyers, policy analysts, activists, and technologists, EFF achieves significant victories on behalf of consumers and the general public. EFF fights for freedom primarily in the courts, bringing and defending lawsuits even when that means taking on the US government or large corporations.”).

6. *Id.*

7. *Id.*

8. See *infra* notes 113–14 and accompanying text.

9. See *infra* note 138 and accompanying text.

10. See *infra* note 138 and accompanying text.

11. See, e.g., Eric Bangeman, *Thomas Verdict Overturned, Making Available Theory Rejected*, ARS TECHNICA, Sept. 24, 2008, <http://arstechnica.com/news.ars/post/20080924-thomas-verdict-overturned-making-available-theory-rejected.html> (“[T]he ruling was another crushing blow to the RIAA’s pet legal theory . . .”).

media are sharing: *The New York Times* can be read in its entirety, often even earlier than print newspapers are delivered, at no cost.¹² Hulu.com shows movies and television shows on user demand in their entirety.¹³ The Firefox web browser uses open source code in its software to allow other developers to build useful, free “add-on” applications such as customizable weather forecasts.¹⁴ Craigslist.org has single-handedly revolutionized classified advertising in the United States by making it free and faster than print newspaper classified advertisements.¹⁵ Wikipedia.org is a free encyclopedia that contains more encyclopedia entries than a print edition could ever contain, and is updated on an ongoing basis to keep up-to-date.¹⁶ In line with this powerful “free” culture, Thomas-Rasset has sold “Free Jammie. Free Everyone” goods online to support her cause.¹⁷ This culture will play a significant role in shaping legislation and, to some extent, court decisions that address this issue.

There is great uncertainty as to what sharing of digital music content is permissible. For example, as a friendly gesture to share American culture with others, President Barack Obama gave the Queen of England an iPod with forty songs by American artists.¹⁸ It was a simple act with no simple answer to the most basic question: did the President break the law?¹⁹

Similarly, there is no simple answer as to whether there is a making-available right. This Note argues that there is no making-available right, but that making-available may be considered as circumstantial evidence of distribution. Part I introduces the origins of the making-available right. Part I.A provides an overview of the phenomenon of music filesharing, starting with Napster, and discusses the technical underpinnings of the filesharing network as applied to legal determinations. Part I.A then presents the industry’s claim that filesharing has negatively impacted the music industry. Part I.A.2 describes the immense scope of the RIAA’s litigation campaign in response to filesharing. Part I.B then outlines the alleged making-available right, explaining why it arose, its Copyright Act of 1976 (Act) underpinnings, and international treaty support for the right. Finally, Part I.B.4 introduces the highest profile case to consider the making-available right, *Capitol Records, Inc. v. Thomas*.²⁰

Part II examines the arguments that have been made both for and against a making-available right, and the proposed alternatives to a making-

12. See *The New York Times*, <http://www.nytimes.com> (last visited Oct. 19, 2009).

13. See Hulu, <http://www.hulu.com> (last visited Oct. 19, 2009).

14. See Add-ons for Firefox, <https://addons.mozilla.org/en-US/firefox> (last visited Oct. 19, 2009).

15. See Craigslist, <http://craigslist.org> (last visited Oct. 19, 2009).

16. See Wikipedia, <http://wikipedia.org> (last visited Oct. 19, 2009).

17. See *infra* note 118 and accompanying text.

18. Posting of Fred von Lohmann to Electronic Frontier Foundation Deep Links Blog, <http://www.eff.org/deeplinks/2009/04/first-sale-president-obama-and-queen-england> (Apr. 2, 2009).

19. See *id.*

20. 579 F. Supp. 2d 1210 (D. Minn. 2008).

available right. Part II.A first looks to the statutory text of the Act. Part II.B follows with an examination of case law, starting with the key appellate decisions and following with district court decisions that have interpreted those key cases. Part II.C examines U.S. obligations under the World Intellectual Property Organization (WIPO) treaties. Finally, Part II.D presents alternatives to a making-available right, including accommodations under domestic law, approaches in international case law, international legislation both pending and enacted, and proposed industry solutions in the United States.

Part III adopts the view of the *Thomas* decision that until the U.S. Congress or Supreme Court intervenes, there is no making-available right, but that making-available may be considered as circumstantial evidence of unauthorized distribution.

I. ORIGINS OF THE MAKING-AVAILABLE RIGHT

Part I introduces filesharing and the music industry's lawsuits in response, with particular focus on the *Thomas* case and the legal underpinnings of the RIAA's claim of a making-available right. Part I.A introduces the phenomenon of filesharing and its impact on the music industry and outlines the massive scale of the RIAA's litigation campaign. Part I.B presents the making-available right, relevant sections of the Act, applicable sections of WIPO treaties, and the *Thomas* case.

A. Filesharing and the Music Industry

Technology has made distribution and reproduction of music nearly cost-free and pervasive. Reproduction and distribution not authorized by the copyright owner is, with limited exceptions, illegal under the Act.²¹ Part I.A.1 examines the phenomenon of sharing music files over the Internet and its alleged impact on the music industry. Part I.A.2 then discusses the industry's initiation of mass lawsuits in response to this technological disruption to their business model.

1. Napster and Its Aftermath

Napster brought peer-to-peer filesharing computer networks (P2P) to the mainstream in 1999.²² P2P is so named because it enables users' computers to communicate directly with one another rather than through a central server, meaning that one "peer" computer communicates directly with another "peer."²³ File transfer is generally much faster on P2P than other networks because the communication is not routed through a central server,

21. See *infra* Part I.B.2.

22. See *supra* note 3.

23. See *MGM v. Grokster*, 545 U.S. 913, 919–20 (2005). Peer-to-peer (P2P) technology has become incredibly popular because extensive storage space and connectivity bandwidth for a central server are not required. See *id.* at 920.

and because many copies of a file are often available on different user computers.²⁴ Importantly for the RIAA, users remain anonymous,²⁵ publicly revealing only an Internet Protocol (IP) address, which is a numerical address on the network for that user's computer, and a username.²⁶

Filesharing has become incredibly popular. The Pirate Bay, a filesharing website, has been listed among the top 100 most visited sites on the Internet.²⁷ Filesharing has also enabled unprecedented sharing of copyrighted materials, and of music in particular. The International Federation of the Phonographic Industry (IFPI) estimates that the ratio of unauthorized to authorized music downloads is more than 40:1.²⁸ Although iTunes,²⁹ the leading authorized online distributor, has now sold over six billion songs,³⁰ some Internet service providers (ISPs) estimate that four billion songs are shared each month via filesharing, which is a ratio closer to 150:1.³¹ Given that until recently approximately 3% of the songs on an average person's iPod music player were downloaded from iTunes, which protected against copying,³² up to 97% of the music that people were listening to on iPod music players could have been shared or acquired via filesharing. Now iTunes sells music without protection against copying, meaning that all music from iTunes can be shared with others via

24. See *id.* at 920.

25. *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 159 (D. Mass. 2008).

26. See *id.* at 160.

27. See Posting of Ernesto to TorrentFreak, <http://torrentfreak.com/the-pirate-bay-100-popular-080518> (May 18, 2008).

28. See Richard Wachman, *Pirates Still Have All the Best Tunes*, OBSERVER (London), May 27, 2007, Business at 4.

29. See What Is iTunes?, <http://www.apple.com/itunes/what-is> (last visited Oct. 19, 2009).

30. Posting of Erick Schonfeld to TechCrunch, <http://www.techcrunch.com/2009/01/06/itunes-sells-6-billion-songs-and-other-fun-stats-from-the-philnote> (Jan. 6, 2009).

31. See Andrew Orłowski, *For Every DRM Download, 16 P2P Swaps*, REG., June 23, 2005, http://www.theregister.co.uk/2005/06/23/guardian_bogus_p2p. Another study estimated that one billion music files are shared every day. JOHN F. GANTZ ET AL., *THE EXPANDING DIGITAL UNIVERSE I* (2007) (citing JOHN GANTZ & JACK B. ROCHESTER, *PIRATES OF THE DIGITAL MILLENNIUM* 175 (2005)).

32. See Steve Jobs, *Thoughts on Music*, (Feb. 6, 2007), <http://www.apple.com/hotnews/thoughtsonmusic>. An iPod is a portable music player that plays music and video files. See iPod Classic Product Introduction, <http://www.apple.com/ipodclassic> (last visited Oct. 19, 2009); see also iTunes Software License Agreement (Mar. 15, 2007), available at <http://images.apple.com/legal/sla/docs/itunes.pdf> ("IMPORTANT NOTE: This software may be used to reproduce materials. It is licensed to you only for reproduction of non-copyrighted materials, materials in which you own the copyright, or materials you are authorized or legally permitted to reproduce. This software may also be used for remote access to music files for listening between computers. Remote access of copyrighted music is only provided for lawful personal use or as otherwise legally permitted. If you are uncertain about your right to copy or permit access to any material you should contact your legal advisor.").

filesharing.³³ A British study demonstrates the scope of filesharing amongst young people: 96% of eighteen- to twenty-four-year-olds copy music illegally, and approximately half of the music on an average teenager's iPod is illegal.³⁴ Overall, one research organization estimates that 10% of downloads are legal.³⁵ Another British study found that the primary source of these illegally copied files is via filesharing: 63% of young people who download music illegally download from filesharing networks.³⁶

The RIAA claims that filesharing has decimated the music industry.³⁷ While the cause of the decline is debatable,³⁸ compact disc (CD) sales in the United States have been in sharp decline since 2000, with CD album sales down 46% by the end of 2007, and CD singles sales almost nonexistent after declining 92%.³⁹ It is important to remember that this is the decline of a single format, however. Legal digital music downloads grew over 28% from 2007 to 2008 to top one billion songs sold.⁴⁰ Earlier, cassette sales showed growth as vinyl sales declined, and CD sales grew while cassette sales declined.⁴¹ Still, looking at all formats (including digital, vinyl, and others), the dollar value of music sales declined 28%

33. Apple has recently entered into an agreement with record companies to eliminate digital rights management (DRM), and therefore has eliminated the technical block to copying music files bought via iTunes. See Posting of Schonfeld, *supra* note 30.

34. See Dan Sabbagh, *Average Teenager's iPod Has 800 Illegal Music Tracks*, TIMES (London), June 16, 2008, at 13.

35. See Press Release, The NPD Group, Consumers Acquired More Music in 2007, but Spent Less (Feb. 26, 2008), http://www.npd.com/press/releases/press_080226a.html.

36. THE UNIV. OF HERTFORDSHIRE & BRITISH MUSIC RIGHTS, 2008 SURVEY INTO THE MUSIC EXPERIENCE AND BEHAVIOUR IN YOUNG PEOPLE 11 (2008).

37. See RIAA—Piracy: Online and on the Street, <http://riaa.org/physicalpiracy.php> (last visited Oct. 19, 2009) ("Across the board, this theft has hurt the music community, with thousands of layoffs, songwriters out of work and new artists having a harder time getting signed and breaking into the business.").

38. See, e.g., BIRGITTE ANDERSEN & MARION FRENZ, THE IMPACT OF MUSIC DOWNLOADS AND P2P FILE-SHARING ON THE PURCHASE OF MUSIC: A STUDY FOR INDUSTRY CANADA 3 (2007), <http://www.ic.gc.ca/eic/site/ipdd-dppi.nsf/eng/ip01457.html> ("Our review of existing econometric studies suggests that P2P file-sharing tends to decrease music purchasing. However, we find the opposite, namely that P2P file-sharing tends to increase rather than decrease music purchasing."); Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 U. CHI. J. POL. ECON. 1, 1–2 (2007) ("Downloads have an effect on sales that is statistically indistinguishable from zero. Our estimates are inconsistent with claims that file sharing is the primary reason for the decline in music sales during our study period.").

39. See RIAA, 2007 YEAR-END SHIPMENT STATISTICS 1 (2007) (explaining that CD album shipments in 2000 were 942,500,000, and in 2007 were 511,100,000, while CD singles shipments in 2000 were 34,200,000, and in 2007 were 2,600,000).

40. See Ayala Ben-Yehuda, *Digital Downloads Break a Billion in 2008*, BILLBOARD.BIZ, Dec. 18, 2008, http://www.billboard.biz/bbbiz/content_display/industry/e3i260af0867f21cdd3cbf806fcf4334326 ("Through Dec. 14 [2008], 1,001,000,000 digital tracks were sold in the United States.").

41. See Posting of C.A. Joyce to Swivel, <http://www.swivel.com/graphs/show/4146447> (Dec. 28, 2006) (graphing the United States music sales on vinyl, cassette, and CD from 1975–2005).

between 2000 and 2007.⁴² Music sales in 2008 continue this trend of decreasing revenues, where increasing sales of digital singles (single songs rather than albums) were insufficient to make up for the significant decline in CD sales.⁴³

2. RIAA Lawsuits

In the face of declining sales, the RIAA sued. They sued a digital music player manufacturer⁴⁴ and filesharing software providers (Napster,⁴⁵ Aimster,⁴⁶ Grokster and KaZaa,⁴⁷ and LimeWire⁴⁸). *MGM v. Grokster, Ltd.*⁴⁹ reached the Supreme Court, which found that the “probable scope of copyright infringement is staggering.”⁵⁰ The Court introduced intent (“inducement”) as an element of vicarious copyright infringement.⁵¹ In *Grokster*, the Court said that “MGM’s evidence gives reason to think that the vast majority of users’ downloads are acts of infringement.”⁵² The RIAA was jubilant with its victory and said that it was the “dawn of a new day.”⁵³

The RIAA also sued over 18,000 individuals who used filesharing networks.⁵⁴ Many saw this as a desperate move and a public relations

42. See RIAA, *supra* note 39 (explaining that the total dollar value of music sales in 2000 was \$14,323,700,000, and in 2007 was \$10,370,000,000).

43. See Coolfer: Music and the Industry, http://www.coolfer.com/blog/archives/2009/01/2008_the_result.php (Jan. 2, 2009, 06:32 EST) (explaining that 2008’s “track equivalent albums,” where an “equivalent album” consists of ten digital tracks, numbered only 107,000,000 in comparison to 362,000,000 CDs sold in 2008 and that although digital track sales, and therefore number of units sold, had grown, the overall number of albums sold declined 15% from 2007, meaning that revenues had declined).

44. See Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys. Inc., 180 F.3d 1072 (9th Cir. 1999).

45. See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

46. See *In re Aimster*, 334 F.3d 643 (7th Cir. 2003).

47. See *MGM v. Grokster, Ltd.*, 545 U.S. 913 (2005).

48. See *Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556 (S.D.N.Y. 2007).

49. 545 U.S. 913.

50. *Id.* at 923.

51. *Id.* at 941 (“MGM’s evidence in this case most obviously addresses a different basis of liability for distributing a product open to alternative uses. Here, evidence of the distributors’ words and deeds going beyond distribution as such shows a purpose to cause and profit from third-party acts of copyright infringement. . . . There is substantial evidence in MGM’s favor on all elements of inducement . . .”).

52. *Id.* at 923.

53. RIAA, RIAA Statement on *MGM v. Grokster* Supreme Court Ruling (June 27, 2005), <http://www.riaa.com/newsitem.php?id=DE79FC7C-A22E-931E-CF31-59E03950450C> (“This decision lays the groundwork for the dawn of a new day—an opportunity that will bring the entertainment and technology communities even closer together, with music fans reaping the rewards.”).

54. Nate Anderson, *Has the RIAA Sued 18,000 People . . . or 35,000?*, ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2009/07/has-the-riaa-sued-18000-people-or-35000.ars> (last visited Oct. 20, 2009) (quoting an RIAA spokeswoman confirming that roughly 18,000 individuals have been sued by the RIAA, but that because suits were first filed as “John Doe” suits, the same individuals were sued twice, resulting in total lawsuits of over 30,000); see also Sarah McBride & Ethan Smith, *Music Industry To Abandon Mass*

nightmare.⁵⁵ The lawsuits targeted individuals who had downloaded, distributed, or made music files available for other users to download via a filesharing network.⁵⁶

But these lawsuits did not reverse the decline in music sales or even decrease the popularity of filesharing. In fact, the publicity generated from the lawsuits may have actually resulted in increased traffic to the filesharing sites.⁵⁷ In one rigorous study done in 2004, the authors concluded that “P2P traffic has never declined; indeed we have never seen the proportion of p2p traffic decrease over time (any change is an increase) in any of our data sources.”⁵⁸ The chairman of the RIAA, Mitch Bainwol, claims that the lawsuits have still served an educational purpose: to make it clear to the public at large that downloading is illegal.⁵⁹ The EFF concedes that the lawsuits have increased awareness of illegality,⁶⁰ but cites several studies demonstrating that the majority of individuals still use filesharing networks even though they believe it is illegal to do so.⁶¹ Without regard to the perception of its legality, one poll found that forty-five percent of Canadians still regard filesharing as something that should be permitted,⁶² and another U.K. survey of young people found that almost two-thirds felt

Suits, WALL ST. J., Dec. 19, 2008, at B1 (estimating 35,000 lawsuits); Posting of David Kravets to Wired, <http://blog.wired.com/27bstroke6/2008/09/proving-file-sh.html> (Sept. 4, 2008, 14:55 EST) (estimating 30,000 lawsuits); Jon Newton, *p2pnet Tanya Andersen v RIAA Digest*, P2PNET, <http://www.p2pnet.net/story/16245> (last visited Oct. 19, 2009) (estimating 40,000 lawsuits).

55. See, e.g., The Lefsetz Letter, <http://lefsetz.com/wordpress/index.php/archives/2008/06/25/enemies-list> (June 25, 2008) (“No one who sues his own customers can . . . [care] about them.”).

56. See, e.g., *Elektra Entm’t Group, Inc. v. Barker*, 551 F. Supp. 2d 234, 236 (S.D.N.Y. 2008) (quoting the RIAA’s complaint alleging that the defendant used KaZaa (a filesharing network) to “download the Copyrighted Recordings, to distribute the Copyrighted Recordings to the public, and/or to make the Copyrighted Recordings available for distribution to others”).

57. See Orlowski, *supra* note 31 (observing that “file sharing surges after each publicity blip”).

58. THOMAS KARAGIANNIS ET AL., IS P2P DYING OR JUST HIDING? 1 (2004), *available at* <http://www.caixa.org/publications/papers/2004/p2p-dying/p2p-dying.pdf>; see also ELEC. FRONTIER FOUND., RIAA V. THE PEOPLE: FIVE YEARS LATER 9–10 (2008), *available at* <http://www.eff.org/wp/riaa-v-people-years-later> (citing concurring studies by computer scientists from University of California San Diego and University of California Riverside, Big Champagne (a provider of filesharing network media measurement), NPD Group (a marketing research firm), BayTSP (a filesharing network monitor for content owners), and Pew Internet and American Life Project (a nonprofit research organization)).

59. See McBride & Smith, *supra* note 54.

60. See ELEC. FRONTIER FOUND., *supra* note 58, at 11 (citing a 2004 study saying that 88% of children between eight- and eighteen-years-old believed that filesharing downloading was illegal).

61. See *id.* (citing studies of high school students reporting that eighty-nine percent downloaded music even though believing it was against the law, and that seventy-two percent of those who got music online did so through filesharing networks).

62. Antony Bruno, *Poll: 45% Say P2P OK*, BILLBOARD.BIZ, Mar. 16, 2009, http://www.billboard.biz/bbbiz/content_display/industry/e3i01058b4cfb43337685fb7e8ca42dea22.

as though they should not have to pay for the music that they listen to.⁶³ It has been reported that the RIAA will not initiate further mass lawsuits against individuals.⁶⁴ Perhaps the RIAA perceived that it had achieved its educational goal or perhaps it instead conceded the ineffectiveness of the litigation campaign.

B. *The Making-Available Right*

Part I.A introduced the phenomenon of filesharing and its impact on the music industry and outlined the massive scale of the RIAA's litigation campaign. Part I.B introduces the making-available right, the applicable laws, and the *Thomas* case. Part I.B.1 explains why the RIAA was driven to claim that there is a making-available right. Part I.B.2 then outlines the relevant sections and applicable statutory text of the Act that is a part of the making-available debate. Part I.B.3 introduces the WIPO treaties that are relevant to the making-available debate. Finally, Part I.B.4 presents the *Thomas* case that has been at the center of the making-available debate.

1. RIAA's Evidentiary Problem: Making-Available to the Rescue

The RIAA has generally not been successful in presenting convincing evidence of distribution. One court even found that "there is almost no evidence in the case."⁶⁵ The RIAA hires investigators⁶⁶ to use the filesharing network to identify the IP addresses of individual users (e.g., Phoenyxxx@KaZaA) that make files available through the filesharing network for the investigators to download.⁶⁷ The RIAA then obtains subpoenas to require the ISPs to disclose the identity of the individuals.⁶⁸ In response, defendants have argued that a copyright owner cannot infringe his own rights.⁶⁹ According to defendants, because the investigator was authorized by the RIAA, there was no illegal distribution or copying.⁷⁰ Often, however, courts have agreed with the RIAA and found that the investigating agent was not authorized to *infringe* and that therefore the evidence is proof of actual dissemination.⁷¹

63. HUMAN CAPITAL, YOUTH AND MUSIC SURVEY 2009, at 6 (2009), available at <http://www.marrakeshrecords.com/Youth%20and%20Music%20Survey%202009%20%28c%29%20Marrakesh%20Records%20Ltd.pdf>.

64. See McBride & Smith, *supra* note 54.

65. *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 158 (D. Mass. 2008).

66. The RIAA first used MediaSentry as its investigator, but later decided to use another investigator, DtecNet Software ApS, with some speculating that this was because of several complaints regarding the privacy of the individuals investigated, and the legality of the investigative methods used. See Sarah McBride, *Changing Tack, RIAA Ditches MediaSentry*, WALL ST. J., Jan. 5, 2009, at B2.

67. See, e.g., *London-Sire*, 542 F. Supp. 2d at 157–58.

68. See, e.g., *id.*

69. See, e.g., Defendant's Reply Brief in Support of Her Motion for New Trial at 5, *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008) (No. 06-1497).

70. *Id.*

71. See, e.g., *Interscope Records v. Leadbetter*, No. C05-1149-MJP-RSL, 2007 WL 1217705, at *4 (W.D. Wa. Apr. 23, 2007).

If required to provide proof of dissemination other than to the agent, however, the RIAA argues that it is impossible for copyright owners to prove the actual transfer of files on filesharing networks.⁷² At least one court agreed.⁷³ Ray Beckerman, a lawyer who frequently represents defendants in RIAA lawsuits, counters that the RIAA has not tried hard enough.⁷⁴ Several organizations such as BigChampagne, NPD, BayTSP, and the investigator hired in the *Thomas* case, all claim to possess expertise in tracking filesharing traffic.⁷⁵ However, “fingerprinting” technology to track copyrighted material, such as Audible Magic,⁷⁶ is currently imperfect; for example, one Belgian case found that it was not technically possible for an ISP to filter its network for music copyright infringement.⁷⁷

The RIAA argues that if record companies are required to prove something that is currently impossible to prove, the copyright owner’s distribution right would be “worthless,” which would go against congressional intent and “common sense.”⁷⁸ Because of this evidentiary problem, the RIAA includes making-available language in its boilerplate complaint.⁷⁹

The RIAA claims that “decades of case law” support a making-available right.⁸⁰ The making-available right first appeared in 1997 in *Hotaling v. Church of Jesus Christ of Latter-Day Saints*.⁸¹ A library had made unauthorized copies of genealogical research materials for other branches, and the copyright owner had repeatedly requested that the unauthorized

72. Plaintiffs’ Supplemental Brief Pursuant to May 15, 2008 Order at 2, *Thomas*, 579 F. Supp. 2d 1210 (No. 06-1497) [hereinafter Plaintiffs’ Supplemental Brief] (“Copyright owners typically have no way to monitor—much less prove—the actual transfer of those files.”).

73. *London-Sire*, 542 F. Supp. 2d at 177 (“[T]ransfers on a peer-to-peer network are not observable by outside users.”).

74. E-mail from Ray Beckerman to author (Oct. 30, 2008, 13:26 EST) (on file with author).

75. See *supra* notes 61, 66 and accompanying text.

76. See About Audible Magic, <http://www.audiblemagic.com/company/about.asp> (last visited Oct. 19, 2009). Another example of a tracking technology is from the Air Force Institute of Technology. It attempts to track allegedly infringing transfers via a unique code attributable to that file, but the technology developers admit difficulties in the speed of analysis, the updating of the database of those codes, and the fact that file sharers would likely use encryption to hide from the technology. Duncan Graham-Rowe, *Sniffing Out Illicit BitTorrent Files*, TECH. REV., Feb. 12, 2009, <http://www.technologyreview.com/computing/22107/page1>.

77. See Chris Williams, *Belgian Judge Reverses Moon-on-Stick Music Copyright Ruling*, REG., Oct. 27, 2008, http://www.theregister.co.uk/2008/10/27/scarlet_isp_belgium_reversal.

78. See Plaintiffs’ Supplemental Brief, *supra* note 72, at 2.

79. See, e.g., *Elektra Entm’t Group, Inc. v. Barker*, 551 F. Supp. 2d 234, 236 (S.D.N.Y. 2008) (“Defendant, without the permission or consent of Plaintiffs, has used, and continues to use, an online media distribution system to download the Copyrighted Recordings, to distribute the Copyrighted Recordings to the public, and/or to *make the Copyrighted Recordings available for distribution to others.*” (emphasis added) (quoting Complaint for Copyright Infringement at 4, *Barker*, 551 F. Supp. 2d 234 (No. 05-CV-7340))).

80. See Plaintiffs’ Supplemental Brief, *supra* note 72, at 17.

81. 118 F.3d 199 (4th Cir. 1997).

copies be destroyed.⁸² The court found that a library infringes the copyright owner's § 106(3) distribution right when it "makes the copy available to the public."⁸³ The court seemed motivated by the potential for inequity. If a library did not keep any records, there would be no proof of distribution, and therefore the library would not have to pay for the right to distribution and would then "unjustly profit by its own omission."⁸⁴ Similarly, then, the RIAA argues that individuals should not profit, and copyright owners should not suffer, because of a lack of evidence of actual distribution.⁸⁵

2. The Copyright Act of 1976

If a making-available right exists as the RIAA argues, it must exist within the context of the statutory framework of the United States. "The rights possessed by the owner of a copyright are purely statutory rights."⁸⁶ As far back as 1834, the Supreme Court declared that, with respect to copyright, Congress created rights rather than sanctioning existing rights.⁸⁷ Congress's authority to enact copyright legislation comes from the Constitution.⁸⁸ Copyright legislation balances the interests of authors' control with the free flow of ideas in society.⁸⁹ Because of this evolving balancing act, copyright legislation changes often.⁹⁰ In fact, the Act has been amended over fifty times.⁹¹

In *Sony Corp. v. Universal City Studios, Inc.*,⁹² the Supreme Court explained that new technology has repeatedly required changes in copyright

82. *See id.* at 201–02.

83. *Id.* at 201.

84. *Id.* at 203 ("Were this not to be considered distribution within the meaning of § 106(3), a copyright holder would be prejudiced by a library that does not keep records of public use, and the library would unjustly profit by its own omission.").

85. Plaintiffs' Supplemental Brief, *supra* note 72, at 2.

86. *Miller v. Goody*, 125 F. Supp. 348, 350 (S.D.N.Y. 1954).

87. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661–62 (1834) ("Congress, then, by this [copyright] act, instead of sanctioning an existing right, as contended for, created it . . . [and therefore] if the right of the complainants can be sustained, it must be sustained under the acts of congress.").

88. U.S. CONST. art. I, § 8 ("Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

89. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (explaining that copyright law "involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand").

90. *Id.*

91. Brief of Amici Curiae Computer & Communications Industry Association & US Internet Industry Association in Connection with Defendant's Motion to Dismiss the Complaint at 4, *Elektra Entm't Group, Inc. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008) (No. 05-CV-7340) (citing U.S. COPYRIGHT OFFICE, CIRCULAR 92: COPYRIGHT LAW OF THE UNITED STATES OF AMERICA iii–viii (2003)).

92. 464 U.S. 417.

law.⁹³ For example, prior to the Copyright Act of 1909, making a copy of a record was not infringement.⁹⁴ The making-available debate therefore properly centers on the meaning of the distribution right, which is defined in the Act at 17 U.S.C. § 106(3).

Making-available is not an exclusive right explicitly granted to copyright owners by the Act.⁹⁵ There are six exclusive rights explicitly stated: (1) reproduction; (2) adaptation; (3) distribution; (4) public performance; (5) public display; and (6) public performance by digital audio transmission.⁹⁶ An exact copy of the original music file cannot be described as an adaptation or derivative work.⁹⁷ In addition, it has been held that digital downloads are not public performances.⁹⁸ The public display right has not been argued in these cases, even though it may be applicable.⁹⁹ Therefore, the making-available debate centers on the reproduction and distribution rights.

93. See *id.* at 430 & n.11 (explaining that legislation has modified copyright law to adapt to the printing press, player pianos with perforated rolls of music, television, and audio tape recorder).

94. See *Miller v. Goudy*, 125 F. Supp. 348, 350 (S.D.N.Y. 1954) (“Prior to the Copyright Act of 1909, the manufacture of phonograph records was not an infringement of copyright. Thus, before the right to authorize the manufacture of phonograph records was given protection by statute, a recording of a work could be made without the author’s consent. We must therefore look to the Copyright Act itself to see the extent of the protection given to the copyright owner.” (citing *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1 (1908))).

95. 17 U.S.C. §§ 101–805 (2006).

96. See *id.* § 106 (“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”).

97. See *id.* § 101 (“A ‘derivative work’ is a work based upon one or more preexisting works . . . [and] recast, transformed, or adapted.”).

98. *United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007).

99. Professor Reese suggests that the drafters of the Act primarily intended for the display right to apply to transmissions over computer networks. R. Anthony Reese, *The Public Display Right: The Copyright Act’s Neglected Solution to the Controversy over RAM “Copies,”* 2001 U. ILL. L. REV. 83, 83. The EFF raised this argument in its amicus brief in *Elektra Entertainment Group, Inc. v. Barker*, but the court did not address the argument. Amicus Curiae Brief of the Electronic Frontier Foundation in Support of Defendant’s Motion to Dismiss the Complaint at 12, *Elektra Entm’t Group, Inc. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008) (No. 05-CV-7340) [hereinafter EFF Brief 2] (“Fundamental to the edifice of copyright law has been a distinction between the reproduction and dissemination of material objects—activities regulated by the reproduction and distribution rights—and the transmission of works to the public—activity regulated by the rights of the public performance and display.” (citing Reese, *supra*, at 92–138)).

The Act states that the distribution right includes “sale,” “transfer of ownership,” “rental,” “lease,” and “lending.”¹⁰⁰ The three major legal treatises on copyright all agree that infringement of the distribution right requires an “actual dissemination.”¹⁰¹ This suggests that the RIAA needs to establish that reproduction took place if it is to prove that distribution occurred. Distribution is not defined in the Act, but it is clear that actual dissemination is not required to prove that publication has occurred, where “offering to distribute,” or making-available, is sufficient.¹⁰²

The distribution right provides that a copyright owner has the exclusive right to “distribute *copies or phonorecords* of the copyrighted work.”¹⁰³ It is debatable whether filesharing involves “copies,” “phonorecords,” or “transfer.” It is arguable that a “digital phonorecord delivery”¹⁰⁴ is a “transfer” and therefore distribution under § 115(c)(3)(A).¹⁰⁵ Further, several other references to “phonorecords” and “copies” in the Act imply that a digitally transmitted file is included in those definitions.¹⁰⁶

100. 17 U.S.C. § 106 (“[T]he exclusive rights to do and to authorize . . . to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”).

101. *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981 (D. Ariz. 2008) (quoting 2 DAVID NIMMER & MELVILLE B. NIMMER, *NIMMER ON COPYRIGHT* § 8.11[A], at 8-149 (2007)); *see also id.* (“[A]n actual transfer must take place; a mere offer for sale will not infringe the right.” (alteration in original) (quoting 2 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 7.5.1, at 7:125 to 7:126 (3d ed. 2005))); *id.* (“Without actual distribution of copies of the [work], there is no violation of the distribution right.” (quoting 4 WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 13:9, at 13-13 (2007))).

102. 17 U.S.C. § 101 (explaining that publication includes “[t]he offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display”).

103. *Id.* § 106(3) (emphasis added). “‘Copies’ are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” *Id.* § 101. “Material object” is not defined in the Act. “‘Phonorecords’ are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed” *Id.* “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Id.*

104. *Id.* § 115(d) (“A ‘digital phonorecord delivery’ is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording”).

105. *Id.* § 115(c)(3)(A) (establishing a compulsory license to “distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission”).

106. Section 112 discusses limitations on the exclusive rights where a “transmitting organization” is permitted to make a copy to make a broadcast so long as it destroys the original “copy or phonorecord” within six months of the first broadcast. *Id.* § 112(a)(1). Where transmitting organizations, such as local television networks, are receiving content via digital transmission, this language implies that the digital copy that they have made for themselves is a “copy” or “phonorecord” of the original. Under these “digital phonorecord” provisions, then, it would appear as though a file that is digitally transmitted via a filesharing network is a “material object” that is a “copy” or “phonorecord” as defined under § 101, and

3. WIPO Treaties

The Act may be interpreted in light of international treaties, particularly the two WIPO treaties that explicitly recognize a making-available right. In the provision that describes the right of distribution, the WIPO Copyright Treaty (WCT) states that an author has a making-available right.¹⁰⁷ Another WCT provision dealing with “communication to the public” might be equated with distribution or publication under the Act, and grants a making-available right.¹⁰⁸ Similarly, the WIPO Performances and Phonograms Treaty (WPPT) describes the distribution right to include a making-available right.¹⁰⁹

4. *Capitol Records, Inc. v. Thomas*

Of the thousands of RIAA cases against individuals, *Capitol Records, Inc. v. Thomas*¹¹⁰ has received the most publicity and was the first case to be decided in a full jury trial.¹¹¹ At the end of the initial trial, the Minnesota jury awarded \$9250 per song, for a total of \$222,000 in statutory damages, for placing twenty-four songs in a share folder in KaZaa, a filesharing computer program.¹¹² This award of \$222,000 was to be paid by Jammie Thomas-Rasset, a single mother of two,¹¹³ making \$36,000 a

the transmission carries out a “transfer” as defined under the § 106(3) distribution right. See *infra* note 178 and accompanying text.

107. WIPO Copyright Treaty art. 6, *adopted* Dec. 20, 1996, S. TREATY DOC. NO. 105-17, at 7 (1997), 2186 U.N.T.S. 121 (explaining that a copyright owner’s rights include “the exclusive right of authorizing the *making available* to the public of the original and copies of their works through sale or other transfer of ownership” (emphasis added)).

108. *Id.* art. 8 (“[A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the *making available* to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.” (emphasis added)).

109. WIPO Performances & Phonograms Treaty art. 12, *adopted* Dec. 20, 1996, S. TREATY DOC. NO. 105-17, at 18 (1997), 2186 U.N.T.S. 203 (explaining that a copyright owner’s rights include “the exclusive right of authorizing the *making available* to the public of the original and copies of their phonograms through sale or other transfer of ownership.” (emphasis added)); see also *id.* art. 8 (explaining that a copyright owner’s rights include “the exclusive right of authorizing the *making available* to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.” (emphasis added)).

110. 579 F. Supp. 2d 1210 (D. Minn. 2008).

111. See Special Verdict Form, *Thomas*, 579 F. Supp. 2d 1210 (No. 06-1497), 2007 WL 3054014; Austin Modine, *RIAA Hits Paydirt: Wins First Music-Sharing Jury Trial*, REG., Oct. 5, 2007, http://www.theregister.co.uk/2007/10/05/riaa_wins_first_music_sharing_jury_trial. A second jury trial has now completed, also finding the filesharer liable for copyright infringement. Jury Verdict Form, Sony BMG Music Entm’t v. Tenenbaum, No. 03-CV-11661 (D. Mass. July 31, 2009) (awarding \$22,500 per song, for a total of \$675,000).

112. See Special Verdict Form, *supra* note 111.

113. See Chris Ayres, *Mother Fined \$220,000 in Download Ruling*, TIMES (London), Oct. 5, 2007, at 46.

year,¹¹⁴ with so few resources that her lawyer made a motion to withdraw because he was not being paid.¹¹⁵ In an effort to gather support and raise money for continuing legal expenses, Thomas-Rasset started a "Free Jammie" blog¹¹⁶ and sold a range of branded items ranging from a thong, to a mug, to a dog T-shirt.¹¹⁷ All items were branded with "Free Jammie. Free Everyone."¹¹⁸ Thomas-Rasset felt as though she was on a mission on behalf of "children, broke college students, [and] parents": "I feel I am in the right position to try to help quite a few of these innocent victims of this bullying."¹¹⁹ The RIAA, with its team of investigators, lawyers, political lobbyists, and financial resources was easily seen as the Goliath in this legal battle.¹²⁰

Judge Michael J. Davis, presiding in the U.S. District Court for the District of Minnesota, cited the U.S. Court of Appeals for the Eighth Circuit precedent, *Olan Mills, Inc. v. Linn Photo Co.*,¹²¹ holding that an investigator's role as agent does not mean that there is no infringement.¹²² Therefore, in *Thomas* the RIAA could have based its distribution infringement claim on this basis alone.¹²³

In addition, the RIAA alleged that Thomas-Rasset infringed its members' copyrights when she made the files available over a filesharing network.¹²⁴

114. See Greg Sandoval, *For RIAA, a Black Eye Comes with the Job*, CNET NEWS, Oct. 9, 2007, http://news.cnet.com/For-RIAA%2C-a-black-eye-comes-with-the-job/2100-1027_3-6212374.html.

115. See *Virgin Records Am., Inc. v. Thomas*, No. 06-1497 (D. Minn. Aug. 31, 2007) (order denying motion to withdraw representation). The case was later renamed *Capitol Records, Inc. v. Thomas* after one record company withdrew, and finally renamed *Capitol Records, Inc. v. Thomas-Rasset* to reflect the correct name of the Defendant, Jammie Thomas-Rasset. See *Thomas*, 579 F. Supp. 2d 1210; Special Verdict Form, *Capitol Records, Inc. v. Thomas-Rasset*, No. 06-1497 (D. Minn. June 18, 2009).

116. See Free Jammie, <http://freejammie.freeforums.org/> (last visited Oct. 19, 2009). Similarly, the defendant in the other filesharing case to complete a full jury trial also established a "Joel Fights Back" website. See Joel Fights Back—It's about more than just music, <http://joelfightsback.com> (last visited Oct. 19, 2009).

117. See Greg Sandoval, *Hate the RIAA? Buy a 'Free Jammie' Thong*, CNET NEWS, Oct. 29, 2007, http://news.cnet.com/8301-10784_3-9806599-7.html?hhTest=1; see also Free Jammie Merchandise Store, <http://www.cafepress.com/freejammie> (last visited Oct. 19, 2009).

118. Sandoval, *supra* note 117.

119. Jammie Thomas, *I'm Fighting This Lawsuit for More Than Just Myself*, DULUTH NEWS TRIB., July 6, 2008, at B1, available at <http://beckermanlegal.com/Documents/080706DuluthNewsTribune.pdf>.

120. See Sandoval, *supra* note 114 ("The image of a rich and gargantuan corporate entity steamrolling a woman with limited resources is etched into the minds of many onlookers, say public relations experts.").

121. 23 F.3d 1345 (8th Cir. 1994).

122. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1214–16 (D. Minn. 2008).

123. *Id.* at 1216 ("The Court holds that distribution to [the investigator] MediaSentry can form the basis of an infringement claim.").

124. Complaint for Copyright Infringement at 4, *Virgin Records Am., Inc. v. Thomas*, No. 06-1497 (D. Minn. Apr. 19, 2006), 2006 WL 1431921.

On the RIAA's suggestion,¹²⁵ the jury was instructed that making-available violates the distribution right.¹²⁶

In an admirable admission that he suspected he had erred, Judge Davis *sua sponte* asked both parties and *amicus curiae* to submit briefs for consideration of a motion for new trial or remittitur on other grounds.¹²⁷ He was concerned that he may have made a manifest error of law for two reasons: (1) the jury instruction may have contradicted binding Eighth Circuit precedent, *National Car Rental System, Inc. v. Computer Associates International, Inc.*,¹²⁸ and (2) plaintiffs' proposed jury instruction¹²⁹ was in part supported by *Atlantic Recording Corp. v. Howell*,¹³⁰ which was later overturned on the determination that there is no making-available right.¹³¹

Both parties and five amici submitted briefs regarding the making-available jury instruction.¹³² One observer noted that the briefs were interesting not so much because of the arguments, since they had all been raised before, but "because of the intensity of the argument."¹³³ The MPAA and the Progress and Freedom Foundation (PFF),¹³⁴ both funded by content owners with corporate ties to the plaintiffs,¹³⁵ sided with the

125. Plaintiffs' Proposed Jury Instructions at 10, *Virgin*, No. 06-1497 (D. Minn. Sept. 17, 2007), 2006 WL 4821318.

126. Jury Instructions at 18, *Thomas*, 579 F. Supp. 2d 1210 (No. 06-1497) ("The act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive right of distribution, regardless of whether actual distribution has been shown." (emphasis added)).

127. See *Capitol Records, Inc. v. Thomas*, No. 06-1497 (D. Minn. May 15, 2008) (order requesting briefs as to whether the making-available jury instruction was in error).

128. 991 F.2d 426 (8th Cir. 1993).

129. Plaintiffs' Proposed Jury Instructions, *supra* note 125, at 10.

130. No. CV06-02076-PHX-NVW, 2007 WL 2409549 (D. Ariz. Aug. 20, 2007), *vacated*, No. CV06-02076-PHX-NVW, 2007 WL 3010792 (D. Ariz. Sept. 27, 2007); *Thomas*, No. 06-1497 (D. Minn. May 15, 2008) (order requesting briefs as to whether the making-available jury instruction was in error).

131. *Howell*, 2007 WL 3010792.

132. Defendant's Second Memorandum of Law in Support of Her Motion for New Trial, *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008) (No. 06-1497); Plaintiffs' Supplemental Brief Pursuant to May 15, 2008 Order, *Thomas*, 579 F. Supp. 2d 1210 (No. 06-1497).

133. Nate Anderson, *Final RIAA/Jammie Thomas Briefs In; New Trial Decision Looms*, ARS TECHNICA, July 14, 2008, <http://arstechnica.com/news.ars/post/20080714-final-riaajammie-thomas-briefs-in-new-trial-decision-looms.html>.

134. See About PFF, <http://www.pff.org/about> (last visited Oct. 19, 2009) ("The Progress & Freedom Foundation is a market-oriented think tank that studies the digital revolution and its implications for public policy. Its mission is to educate policymakers, opinion leaders and the public about issues associated with technological change, based on a philosophy of limited government, free markets and individual sovereignty.").

135. See MPAA Members Page, <http://www.mpaa.org/AboutUsMembers.asp> (last visited Oct. 19, 2009) (explaining that the MPAA's Board of Directors consists of representatives from Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLP, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.); PFF Supporters, <http://www.pff.org/about/supporters.html> (last visited Oct. 19, 2009) (explaining that the supporters of the Progress & Freedom Foundation (PFF) include the following: AT&T, CBS Corporation, Comcast

plaintiffs.¹³⁶ The EFF, twelve copyright law professors, and the Intellectual Property Institute of William Mitchell College of Law filed briefs in support of Thomas-Rasset.¹³⁷ After consideration, Judge Davis vacated the judgment and granted a new trial.¹³⁸ The RIAA filed a motion for interlocutory appeal,¹³⁹ but Judge Davis denied the motion,¹⁴⁰ and a new trial was scheduled.¹⁴¹ In the new trial, without a making-available right, the jury found that Thomas-Rasset violated the copyright owners' distribution right and held her liable for \$1,920,000,¹⁴² nearly nine times the original \$220,000 award.¹⁴³ Thomas-Rasset has appealed the decision.¹⁴⁴

In deciding on the making-available right, Judge Davis found that *National Car Rental* was controlling Eighth Circuit precedent and that there was no substantial basis for a difference in opinion as to whether there is a making-available right.¹⁴⁵ Judge Davis found that "[t]he specter of

Corporation, Cox Enterprises, DIRECTV, EMI Group, Entertainment Software Association, Intel Corporation, National Cable & Telecommunications Association, NBC Universal, The News Corporation Limited, Sony & BMG Music Entertainment, Inc., Time Warner, VeriSign, Inc., Verizon Communications, Viacom Inc., Vivendi, and The Walt Disney Company). As Thomas-Rasset noted, both the MPAA and the PFF represent other subsidiaries of the same parent companies of the plaintiffs in this case. See Defendant's Second Memorandum of Law in Support of Her Motion for New Trial, *supra* note 132, at 4–5 (pointing out that Sony Corporation, Vivendi, and EMI Group own companies that are plaintiffs and other companies that have filed briefs as amici curiae).

136. See Proposed Brief of Amicus Curiae Motion Picture Association of America, Inc., *Thomas*, 579 F. Supp. 2d 1210 (No. 06-1497) [hereinafter MPAA Brief]; Amicus Curiae Brief of Thomas D. Sydnor of the Progress & Freedom Foundation Opposing the Motion for a New Trial, *Thomas*, 579 F. Supp. 2d 1210 (No. 06-1497) [hereinafter PFF Brief].

137. See Brief Amici Curiae of Electronic Frontier Foundation, Public Knowledge, United States Internet Industry Association, and Computer & Communications Industry Association in Support of Defendant Jammie Thomas, *Thomas*, 579 F. Supp. 2d 1210 (No. 06-1497) [hereinafter EFF Brief]; Brief of Copyright Law Professors as Amici Curiae in Support of Defendant, *Thomas*, 579 F. Supp. 2d 1210 (No. 06-1497) [hereinafter Professors' Brief]; Memorandum of Amicus Curiae Intellectual Property Institute of William Mitchell College of Law in Support of Defendant's Motion for a New Trial, *Thomas*, 579 F. Supp. 2d 1210 (No. 06-1497).

138. *Thomas*, 579 F. Supp. 2d at 1226–27 (“Jury Instruction No. 15 was erroneous and that error substantially prejudiced Thomas’s rights. Based on the Court’s error in instructing the jury, it grants Thomas a new trial.”).

139. Plaintiffs’ Memorandum in Support of Motion to Certify September 24 Order for Interlocutory Appeal and for Stay of Proceedings Pending Appeal, *Thomas*, 579 F. Supp. 2d 1210 (No. 06-1497).

140. *Capitol Records, Inc. v. Thomas*, No. 06-1497, 2008 WL 5423133, at *2 (D. Minn. Dec. 23, 2008).

141. Date Certain Trial Notice at 1, *Capitol Records, Inc. v. Thomas*, No. 06-CV-1497 (D. Minn. Oct. 29, 2008).

142. Special Verdict Form, *supra* note 115, at 17–20.

143. See *supra* notes 111–12 and accompanying text.

144. Motion for a New Trial, Remittitur, and to Alter or Amend the Judgment, *Thomas-Rasset*, No. 06-1497 (D. Minn. July 6, 2009).

145. *Capitol Records, Inc. v. Thomas*, No. 06-1497, 2008 WL 5423133, at *1 (D. Minn. Dec. 23, 2008) (“The Court holds that there is not substantial ground for difference of opinion regarding whether distribution under § 106(3) requires actual dissemination. While Plaintiffs can point to a number of courts from other jurisdictions that have disagreed with this Court’s conclusion, the Eighth Circuit Court of Appeals has explicitly held that actual dissemination is required . . .”).

impossible-to-meet evidentiary standards . . . is overstated,” and the RIAA has other viable alternatives: (1) the uploader violates the reproduction right when making a copy to share, (2) the uploader is vicariously liable for inducing infringement by others, or (3) the downloader is liable for violation of the reproduction right.¹⁴⁶

II. COURTS AND OBSERVERS IN CONFLICT

Part I introduced filesharing and the music industry’s lawsuits in response, with particular focus on the *Thomas* case and the legal underpinnings of the RIAA’s claim of a making-available right. Part II examines the arguments for and against a making-available right. Part II.A examines the statutory text of the Act. Part II.B then analyzes key courts of appeals decisions, as well as district court decisions interpreting those cases. Part II.C presents arguments relating to the WIPO treaties. Finally, Part II.D provides a broad survey of alternatives to a making-available right.

A. Statutory Text

Copyright is a statutory right, therefore statutory interpretation is the primary basis for determining whether there is a making-available right.¹⁴⁷ As Judge Davis found in *Thomas*, the “plain meaning” of the Act is not so plain: “Each party asserts that the Court should adopt the plain meaning of the term ‘distribution;’ however, they disagree on what that plain meaning is.”¹⁴⁸ Part II.A.1 discusses whether distribution and publication are synonymous, thereby recognizing a making-available right. Part II.A.2 examines whether the right to *authorize* distribution is a making-available right. Finally, Part II.A.3 evaluates whether a digital file is a “copy” or “phonorecord” involving a “transfer of ownership” as required by the Act in order to infringe the copyright owner’s rights.

1. Are Distribution and Publication Synonymous?

The Act’s definition of publication includes offering to distribute.¹⁴⁹ If distribution and publication are synonymous, then distribution would include offering to distribute, and there would be a making-available right. The RIAA and several courts have noted that the wording of the first sentence of the distribution right and the definition of publication are very similar.¹⁵⁰ They consequently infer that the two terms are synonymous; the

146. *Thomas*, 579 F. Supp. 2d at 1225.

147. See *supra* notes 86–91 and accompanying text.

148. *Thomas*, 579 F. Supp. 2d at 1216.

149. See *supra* note 102 and accompanying text.

150. See, e.g., *Elektra Entm’t Group, Inc. v. Barker*, 551 F. Supp. 2d 234, 240 (S.D.N.Y. 2008) (“The first sentence of Section 106(3) and the definition of ‘publication’ are virtually identical.”); see also 17 U.S.C. § 101 (2006) (“‘Publication’ is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental,

second sentence (“the offering to distribute”) also applies to the definition of distribution, and an offer to distribute infringes the distribution right.¹⁵¹ However, other courts have disagreed¹⁵² and found that, according to the plain meaning of the Act, all distributions are publications, but not all publications are distributions.¹⁵³ Judge Davis adopted this view in *Thomas*.¹⁵⁴

It is also argued that the Supreme Court equated the two terms in *Harper & Row Publishers, Inc. v. Nation Enterprises*,¹⁵⁵ when the Court quoted a legislative committee report saying that § 106(3) established a statutory right of first publication and that “[u]nder this provision the copyright owner would have the right to control the first public *distribution* of an authorized copy . . . of his work.”¹⁵⁶ Others, including Judge Davis in *Thomas*, have argued in response that *Harper & Row* held only that there was a statutory right to first publication, with no reference to the definitions of distribution or publication.¹⁵⁷

lease, or lending.”); *id.* § 106(3) (stating that the copyright owner has the exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending”).

151. *See, e.g.,* *Ford Motor Co. v. Summit Motor Prods.*, 930 F.2d 277, 299 (3d Cir. 1991) (“‘Publication’ and the exclusive right protected by section 106(3), then, are for all practical purposes, synonymous.”); *Barker*, 551 F. Supp. 2d at 243 (“[T]he Court finds, using Congress’s words, that the distribution right of 106(3) may be infringed by ‘[t]he offer[] to distribute’” (final two alterations in original) (quoting 17 U.S.C. § 101)); *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 969 (N.D. Tex. 2006) (“The right of distribution also has been identified as synonymous with the publication of a copyrighted work.”); *Interscope Records v. Duty*, No. 05CV3744-PHX-FJM, 2006 WL 988086, at *2 (D. Ariz. Apr. 14, 2006) (“‘Distribute’ is not defined under the Copyright Act, but the right of distribution is synonymous with the right of publication, and ‘publication’ is defined under the Copyright Act.”) (citation omitted); *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 401 n.2 (S.D.N.Y. 2002) (“The definition of ‘publication’ tracks the language of 17 U.S.C. § 106(3), which gives copyright holders the exclusive right ‘to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.’ Section 106(3) therefore gives copyright holders the exclusive right of publication, among the other exclusive rights.”).

152. *See, e.g.,* *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 168 (D. Mass. 2008) (“[E]ven a cursory examination of the statute suggests that the terms are not synonymous.”).

153. *See id.* at 169 (“By the plain meaning of the statute, all ‘distributions . . . to the public’ are publications. But not all publications are distributions to the public—the statute explicitly creates an additional category of publications that are not themselves distributions.”).

154. *See* *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1220 (D. Minn. 2008) (“The Court concludes that simply because all distributions within the meaning of § 106(3) are publications does not mean that all publications within the meaning of § 101 are distributions. The statutory definition of publication is broader than the term distribution as used in § 106(3).”).

155. 471 U.S. 539 (1985).

156. *Id.* at 552 (emphasis added) (quoting H.R. REP. NO. 94-1476, at 62 (1976), *reprinted in* 1976 U.S.C.A.N. 5659, 5675).

157. *See Thomas*, 579 F. Supp. 2d at 1220 (“In *Harper & Row*, the Supreme Court narrowly addressed the issue of first publication. It did not discuss the meaning of the term distribution; nor did it discuss publication or distribution in general.”); *London-Sire*, 542 F. Supp. 2d at 168 (“The Supreme Court stated only that § 106(3) ‘recognized for the first time

2. Is There an Exclusive Right “To Authorize” Distribution?

Under the Act, the copyright owner “has the exclusive rights to do and to authorize . . . to distribute.”¹⁵⁸ This, says the RIAA, means that there is an “exclusive right to ‘authorize’ distribution.”¹⁵⁹ It argues that courts must interpret the Act according to the ordinary meaning of “authorize,”¹⁶⁰ and they cite a case from the U.S. Court of Appeals for the Fourth Circuit that quotes the “to do and to authorize” language, but does not speak directly on the alleged “authorization” right.¹⁶¹

Courts, however, have been seemingly unanimous in declaring that this language does not create a separate “authorization” right¹⁶² but, rather, that “authorize” provides statutory support for third-party liability,¹⁶³ such as contributory infringement, as found in *Grokster*. This interpretation rests largely on legislative history as stated in the house report.¹⁶⁴ Judge Davis agreed.¹⁶⁵

a distinct statutory right of first publication,’ and quoted the legislative history as establishing that § 106(3) gives a copyright holder ‘the right to control the first public distribution of an authorized copy . . . of his work.’” (quoting *Harper & Row*, 471 U.S. at 552)).

158. 17 U.S.C. § 106 (2006) (emphasis added).

159. Plaintiffs’ Supplemental Brief, *supra* note 72, at 15.

160. *Id.* at 15–16 (citing dictionary definitions and court decisions defining “authorization”).

161. See *Frasier v. Adams-Sandler, Inc.*, 94 F.3d 129, 130 (4th Cir. 1996) (“Section 106 grants the owner of a copyright ‘the exclusive rights to do and to authorize’ any of five different activities[;] . . . [b]ecause *Frasier* does not allege that Adams-Sandler used or authorized the use of his copyrighted photographs, Adams-Sandler cannot be held liable as an infringer.”).

162. See, e.g., *Venegas-Hernández v. Asociación de Compositores y Editores de Música Latinoamericana*, 424 F.3d 50, 57 (1st Cir. 2005) (“Because the right to ‘authorize’ is literally one of the exclusive rights provided in section 106, the authorizing person could (as a matter of language) be treated as an infringer subject to statutory damages even if no listed infringing act (for example, performance) actually occurred. Yet the legislative origins of the ‘authorize’ language in the statute arguably support a narrower reading, and most (perhaps all) courts that have considered the question have taken the view that a listed infringing act (beyond authorization) is required for a claim.”); *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088, 1094 (9th Cir. 1994) (“[W]e do not think Congress intended to hold a party liable for *merely* ‘authorizing’ conduct that, had the *authorizing* party chosen to engage in itself, would have resulted in no liability under the Act.”); *NFL v. PrimeTime 24 Joint Venture*, No. 98 Civ. 3778, 1999 WL 163181, at *4 (S.D.N.Y. Mar. 24, 1999) (“In this Court’s view, *Subafilms* is correct insofar as it holds that 17 U.S.C. § 106 does not create an infringeable right of authorization independent of infringement of one of the specific enumerated rights set forth in that section.”).

163. See *Subafilms*, 24 F.3d at 1093 (explaining that “‘to authorize’ [wa]s simply a convenient peg on which Congress chose to hang the antecedent jurisprudence of third party liability” (alteration in original) (quoting 3 DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 12.04[A][3][a], at 12-84 n. 81 (1993))).

164. *Id.* (“Use of the phrase ‘to authorize’ is intended to avoid any questions as to the liability of contributory infringers.” (emphasis omitted) (quoting H.R. REP. NO. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674)).

165. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1221 (D. Minn. 2008) (“The Court concludes that the authorization clause merely provides a statutory foundation for secondary liability, not a means of expanding the scope of direct infringement liability.”).

The RIAA presented language from *New York Times Co. v. Tasini*,¹⁶⁶ however, that Judge Davis could not easily dismiss. *Tasini* involved electronic publishing database companies that made freelance writers' articles electronically available in their database without the writers' consent, but with the consent of the print publishers that originally published the articles.¹⁶⁷ The Supreme Court decided that the print publishers infringed the writers' exclusive rights when the print publishers authorized the electronic publishers to publish the articles.¹⁶⁸ Spanning several pages of the opinion, Judge Davis attempted to differentiate *Tasini*, but nonetheless admitted that "the language cited by Plaintiffs could be construed to indicate the Supreme Court's approval of an independent right to authorize."¹⁶⁹ Judge Davis said that "as a whole" *Tasini* does not support this interpretation and that *Tasini* addressed unauthorized copying rather than distribution.¹⁷⁰ Judge Davis explained that the Supreme Court did not recognize a making-available right, but only that the publisher would have been vicariously liable had the works been actually downloaded (i.e., distributed).¹⁷¹ The RIAA cited this point as presenting "substantial grounds for disagreement" in its motion to appeal the vacated judgment.¹⁷²

3. Is a Digital File a "Copy or Phonorecord" and Is a Digital Transmission a "Transfer of Ownership"?

Although not a line of argument raised in *Thomas*, if digital files and digital transmissions do not fall under the Act, making them available over a filesharing network would not infringe copyright owners' rights. The EFF argued in its amicus curiae brief in *Elektra Entertainment Group, Inc. v. Barker*¹⁷³ that digital transmissions were not considered to be "material objects" by Congress and Congress addressed digital transmissions in § 115(c)(3)(A), rather than in § 106(3).¹⁷⁴ However, in *Tasini*, the Supreme

166. 533 U.S. 483 (2001).

167. *Id.* at 487.

168. *Id.* at 506 ("We further conclude that the Print Publishers infringed the Authors' copyrights by *authorizing* the Electronic Publishers to place the Articles in the Databases and by aiding the Electronic Publishers in that endeavor." (emphasis added)).

169. *Thomas*, 579 F. Supp. 2d at 1222.

170. *Id.* at 1222–23.

171. *Id.* at 1222 ("[T]he Supreme Court was generally discussing the multiple exclusive rights that are violated in the general scenario in which the Print Publisher provides copies of the Articles to the Electronic Publishers, who distribute those copies to the public, who then download the copies themselves.").

172. Plaintiffs' Memorandum in Support of Motion to Certify September 24 Order for Interlocutory Appeal and for Stay of Proceedings Pending Appeal at 7, Capitol Records, Inc. v. Thomas, No. 06-1497 (D. Minn. Oct. 14, 2008) ("[T]here are reasonable (and, Plaintiffs believe, dispositive) arguments that the Supreme Court's decision in *New York Times Co. v. Tasini*, 533 U.S. 483, 488 (2001), concludes that a work is distributed under Section 106(3) when it is made available in a database from which others could download it.").

173. 551 F. Supp. 234 (S.D.N.Y. 2008).

174. See EFF Brief 2, *supra* note 99, at 3–7. The EFF also argues that Congress specifically chose not to amend § 106(3) when it enacted the Artists' Rights and Theft Prevention (ART) Act of 2005 and the No Electronic Theft (NET) Act. *Id.* at 6.

Court seemingly presumed that electronic-only distribution is the distribution of a material object, and the lower courts have followed suit.¹⁷⁵

In addition, digital transmissions may not infringe the distribution right under the Act: to infringe the owner's distribution right, a "transfer" is required.¹⁷⁶ When one person owns a physical CD containing music and sells it to another person for five dollars, the CD changes hands. It is clear that there has been a sale and a transfer of ownership. But when one person has a file on a computer and another person makes a copy of that file through a filesharing network, the first person still has the original file and no money has been exchanged. There has been no transfer of ownership of the original file and no rental, lease, or lending as required by § 106(3).¹⁷⁷

Professor Jane Ginsburg has said that taking § 106(3) together with the definition of digital phonorecord delivery in § 115(d), and other parts of the Act may "effectively enlarge the definition of distribution," and that many courts have taken a common-sense position that it is distribution.¹⁷⁸ Still, § 106(3) is what ultimately defines the distribution right, and the EFF argued that "it is telling that Congress specifically chose *not* to amend § 106(3)";¹⁷⁹ EFF cited a Senate report saying that "reading § 106(3) to include digital transmissions was controversial and 'express[ing] no view on current law in this regard.'"¹⁸⁰

175. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007) (citing *Tasini* and saying that "[t]he Supreme Court has indicated that in the electronic context, copies may be distributed electronically"); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 171 (D. Mass. 2008) (citing *Tasini* and holding that "[t]he electronic file (or, perhaps more accurately, the appropriate segment of the hard disk) is therefore a 'phonorecord' within the meaning of the statute"); *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 968 (N.D. Tex. 2006) (citing *Tasini* and stating that "even if the statutory language is arguably ambiguous on this point, the courts have not hesitated to find copyright infringement by distribution in cases of file-sharing or electronic transmission of copyrighted works" before holding that copies may be distributed electronically); see also Part I.B.2.

176. 17 U.S.C. § 106(3) (2006).

177. *Id.*

178. "Making Available" Transcript From March 28th Fordham Law School IP Law Conference, <http://recordingindustryvspeople.blogspot.com/2008/05/transcript-of-march-28th-fordham-law.html> (May 2, 2008, 17:52 EST) (stating that courts "have taken the common-sense position that if the recipient ends up with copies and the recipient got those copies because of a process that was triggered by the defendant, that is a distribution"). In addition, Jane Ginsburg's coauthor Jessica Litman has "pointed out that the courts have done quite a job of interpreting the Copyright Act while ignoring the text. So in that case, common sense might prevail." *Id.*; see also *Perfect 10*, 508 F.3d at 1162 (dealing with the issue of "material object" and "transfer" in one sentence: "The Supreme Court has indicated that in the electronic context, copies may be distributed electronically." (citing *New York Times Co. v. Tasini*, 533 U.S. 483, 488 (2001))).

179. Amicus Curiae Brief of the Electronic Frontier Foundation in Support of Defendant's Motion to Dismiss the Complaint at 6, *Elektra Entm't Group, Inc. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008) (No. 05-CV-7340).

180. *Id.* (quoting S. REP. NO. 104-128, at 17 (1995), reprinted in 1995 U.S.C.A.A.N. 357, 364) (citing *Reese*, *supra* note 99, at 133).

B. Case Law

Part II.A examined arguments for and against a making-available right based on the statutory text of the Act. But the determination of copyright infringement has not been based on statutory wording alone. The Supreme Court held in *Sony Corp. of America v. Universal City Studios, Inc.*¹⁸¹ that “[t]he absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements” and proceeded to apply the common law concept of vicarious liability, which is “imposed in virtually all areas of the law,” to investigate whether Sony was liable for contributory infringement.¹⁸² Part II.B.1 explains that the making-available right was first found in *Hotaling*, rather than in the Act. As evidence of support for *Hotaling*, the RIAA regularly cites one line from the U.S. Court of Appeals for the Ninth Circuit’s *Napster* case, which is evaluated in Part II.B.2. In *Thomas*, Judge Davis was subject to Eighth Circuit binding precedent in *National Car Rental*, which is examined in Part II.B.3. Part II.B.4 explains that Judge Davis also likely felt bound to heed the weight of authority of other district court decisions.

1. The Fourth Circuit: *Hotaling*

Hotaling originated the making-available right, but it has been heavily criticized, particularly in *Atlantic Recording Corp. v. Howell*.¹⁸³ As mentioned earlier, the court in *Hotaling* was concerned with the potential for an inequitable result where an infringer would face no liability because the infringer did not himself maintain records of such infringement.¹⁸⁴ The courts have criticized *Hotaling* for a lack of supporting precedent¹⁸⁵ and for ignoring the plain meaning of the statute.¹⁸⁶ Judge Davis criticized *Hotaling* for a lack of precedent, and for being inconsistent with the Act.¹⁸⁷ He found that the Fourth Circuit “was guided by equitable concerns.”¹⁸⁸ The *Howell* opinion also provides a broad survey of district court decisions on the making-available right, mentioning that some have declined to

181. 464 U.S. 417 (1984).

182. *Id.* at 435.

183. 554 F. Supp. 2d 976, 983 (D. Ariz. 2008) (“The majority of district courts have rejected the recording companies’ ‘making available’ theory because *Hotaling* is inconsistent with the Copyright Act.”).

184. *See supra* notes 81–84 and accompanying text.

185. *See id.* (“‘Respectfully, *Hotaling* did not cite any precedent in holding that making copyrighted works available to the public constitutes infringement . . . [its] interpretation, even if sound public policy, is not grounded in the statute.’” (quoting *Barker*, 551 F. Supp. 2d at 242–43)).

186. *See id.* (“noting a ‘lacuna in the Fourth Circuit’s reasoning’ because ‘[i]t is a “distribution” that the statute plainly requires’” (alteration in original) (quoting *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 168 (D. Mass. 2008))); *id.* (“declining to apply *Hotaling* because it is contrary to the weight of authority and ‘inconsistent with the text and legislative history of the Copyright Act of 1976’” (quoting *In re Napster*, 377 F. Supp. 2d 796, 803 (N.D. Cal. 2005))).

187. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1224–25 (D. Minn. 2008).

188. *Id.* at 1224.

decide the issue entirely,¹⁸⁹ and others have refused motions to dismiss without ruling on the issue.¹⁹⁰

Remarkably, in *Howell*, Judge Neil Wake reversed his own previous decision¹⁹¹ that the RIAA cited in *Thomas* as support for the making-available Jury Instruction No. 15.¹⁹² This in part prompted Judge Davis to reconsider his own decision regarding Jury Instruction No. 15 in *Thomas*.¹⁹³

2. The Ninth Circuit: *Napster* & *Perfect 10*

In arguing for a making-available right, the RIAA often relies on a statement in *A&M Records, Inc. v. Napster, Inc.*,¹⁹⁴ a Ninth Circuit case that said “Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.”¹⁹⁵ Similarly, the first *Howell* decision cited *Perfect 10, Inc. v. Amazon.com, Inc.*¹⁹⁶ for the proposition that “the owner of a collection of works who makes them available to the public may be deemed to have distributed copies of the works.”¹⁹⁷ Although the quoted line from *Perfect 10* was summarizing *Hotaling*’s holding,¹⁹⁸ *Perfect 10* went on to say that individual Napster users violated the copyright owners’ distribution rights “when they used the Napster software to make their collections available to all other Napster users.”¹⁹⁹ *Perfect 10* considered the liability of Google, rather than individual computer network users, and held that Google did not distribute

189. *Howell*, 554 F. Supp. 2d at 982–83 (citing *Interscope Records v. Leadbetter*, No. C05-1149-MJP-RSL, 2007 WL 1217705, at *3–4 (W.D. Wa. Apr. 23, 2007)); see also *Maverick Recording Co. v. Goldshteyn*, No. CV-05-4523, 2006 WL 2166870, at *3 (E.D.N.Y. July 31, 2006) (“[T]he ‘making available’ argument need not be decided here [S]uch details are rightly the province of the discovery phase and summary judgment.”).

190. *Howell*, 554 F. Supp. 2d at 983 (“To be clear, we do not conclude that the mere presence of copyrighted sound recordings in Duty’s share file constitutes copyright infringement. We have an incomplete understanding of the Kazaa technology at this stage.” (citing *Interscope Records v. Duty*, No. 05CV3744-PHX-FJM, 2006 WL 988086, at *3 n.3 (D. Ariz. Apr. 14, 2006))); *id.* (“[T]he Court is not prepared at this stage of the proceedings to rule out the Plaintiffs’ ‘making available’ theory as a possible ground for imposing liability.” (alteration in original) (citing *Warner Bros. Records, Inc. v. Payne*, No. W-06-CA-051, 2006 WL 2844415, at *4 (W.D. Tex. July 17, 2006))).

191. *Atl. Recording Corp. v. Howell*, No. CV06-02076-PHX-NVW, 2007 WL 2409549 (D. Ariz. Aug. 20, 2007), *rev’d*, *Atl. Recording Corp. v. Howell*, No. CV06-02076-PHX-NVW, 2007 WL 3010792 (D. Ariz. Sept. 27, 2007).

192. Plaintiffs’ Proposed Jury Instructions, *supra* note 125, at 10.

193. *Capitol Records, Inc. v. Thomas*, No. 06-1497, at 2–3 (D. Minn. May 15, 2008) (order requesting briefs as to whether the making-available jury instruction was in error).

194. 239 F.3d 1004 (9th Cir. 2001).

195. *Napster*, 239 F.3d at 1014.

196. 487 F.3d 701 (9th Cir. 2007).

197. *Howell*, 2007 WL 2409549, at *3, *rev’d*, CV06-02076-PHX-NVW, 2007 WL 3010792 (D. Ariz. Sept. 27, 2007) (quoting *Perfect 10*, 487 F.3d at 718–19).

198. *Perfect 10*, 487 F.3d at 718–19 (“*Hotaling* held that the owner of a collection of works who makes them available to the public may be deemed to have distributed copies of the works.”).

199. *Id.* at 719 (citing *Napster*, 239 F.3d at 1011–14).

images when it provided user access to thumbnail images via its Internet search engine.²⁰⁰ Although not directly on point since this case addressed a network provider like Napster rather than individual users like Jammie Thomas-Rasset, the principle enunciated was part of the rationale of the decision rather than dicta.

In reversing its first decision, *Howell* argued that in *Napster* there was no analysis, explanation, or cited precedent, and that the language relied on by RIAA was dicta since actual dissemination had not been in dispute.²⁰¹ *Howell* went on to point out that *Perfect 10* found that “the district court’s conclusion [that distribution requires an “actual dissemination”] is consistent with the language of the Copyright Act,”²⁰² which “contradicts *Hotelling* and casts doubt on the single unsupported line from *Napster* upon which the recording companies rely.”²⁰³ In *Thomas*, Judge Davis did not address *Napster* or *Perfect 10* in vacating the judgment.²⁰⁴

3. The Eighth Circuit: *National Car Rental*

Judge Davis requested briefs on the making-available jury instruction in part because of *Howell*, but also because of Eighth Circuit precedent.²⁰⁵ In the request, Davis cited *National Car Rental* and its statement that “[i]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords.”²⁰⁶

The RIAA pointed out that the making-available right was not at issue in *National Car Rental*, and therefore argued that the statement is dicta.²⁰⁷ The sentence preceding the key statement in *National Car Rental* stated that “the distribution right is only the right to distribute *copies* of the work,”²⁰⁸ indicating that the statement was intended only to clarify *what* must be distributed (copies), rather than *how* it must be distributed (actual

200. *Id.*

201. *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 982 (D. Ariz. 2008) (“The court cited no precedent and offered no analysis in explanation of that statement. Its review of the issue was cursory because neither party disputed that Napster users were using the system to disseminate actual, unauthorized copies of copyrighted works to the public. The central issue in the case was secondary liability for the creators of the Napster file-sharing system.” (citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001))).

202. *Id.* (quoting *Perfect 10*, 487 F.3d at 718).

203. *Id.*

204. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008).

205. *See Capitol Records, Inc. v. Thomas*, No. 06-1497, at 2 (D. Minn. May 15, 2008) (order requesting briefs as to whether the making-available jury instruction was in error) (“[T]he Court is concerned that Jury Instruction No. 15 may have been contrary to binding Eighth Circuit precedent.”).

206. *Id.* (quoting *Nat’l Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993)).

207. *See Plaintiffs’ Reply Brief Pursuant to May 15, 2008 Order at 8, Thomas*, 579 F. Supp. 2d 1210 (No. 06-1497).

208. *Nat’l Car Rental*, 991 F.2d at 434.

dissemination). Defendants countered that this context did not detract from the statement of basic legal principles,²⁰⁹ and Judge Davis agreed.²¹⁰

The argument is that since actual dissemination of a copy was one of the grounds for the *National Car Rental* decision, rather than dictum, the Eighth Circuit has considered and rejected a making-available right.²¹¹ This binding precedent contradicted to Jury Instruction No. 15, which necessitated a new trial.

4. District Court Decisions

Beyond *Howell*, *Napster*, and *Hotaling*, in *Thomas* the RIAA cited two other district court cases in support for the making-available Jury Instruction No. 15.²¹² The first, *BMG Music v. Gonzalez*,²¹³ stated that *Grokster*'s finding of contributory infringement was founded on "a belief that people who *post* or download music files are primary infringers."²¹⁴ However, making-available was not in dispute in the case since reproduction, rather than distribution, was at issue.²¹⁵ The second, *Sony Music Corp. v. Scott*,²¹⁶ also involved a defendant admission of infringement by making unauthorized reproductions.²¹⁷

In *Thomas*, Judge Davis did not cite heavily other district court decisions, but he did cite *Howell* repeatedly in vacating the judgment.²¹⁸ *Howell* stated that "the great weight of authority" of district court decisions have concluded that there is no making-available right,²¹⁹ but did acknowledge two cases that recognized a making-available right.²²⁰ *Universal City Studios Productions LLP v. Bigwood*²²¹ dealt with the issue in one sentence, citing *Hotaling* and *Napster*, with no further analysis of the issue.²²² *Motown Record Co. v. DePietro*²²³ relegated its analysis of the issue to a

209. See Defendant's Reply Brief, *supra* note 69, at 19.

210. *Thomas*, 579 F. Supp. 2d at 1224–25.

211. *Id.* at 1223 ("[T]he appellate court has, in fact, addressed and rejected the making-available argument.").

212. See Plaintiffs' Proposed Jury Instructions, *supra* note 125, at 10.

213. 430 F.3d 888 (7th Cir. 2005).

214. *Id.* at 889 (emphasis added).

215. *Id.* (explaining that the court's findings of fact included that "[i]t is undisputed, however, that she downloaded more than 1,370 copyrighted songs").

216. No. 03 Civ. 6886, 2005 U.S. Dist. LEXIS 46848 (S.D.N.Y. Feb. 18, 2005).

217. *Id.* at *3 ("Based on the admissions entered against Defendant and Plaintiffs' submissions, the Court finds it clear that there is no genuine issue of material fact as to Defendant's liability for infringing Plaintiffs' copyrights.").

218. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1215, 1220, 1223 (D. Minn. 2008).

219. *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 983 (D. Ariz. 2008).

220. *Id.*

221. 441 F. Supp. 2d 185 (D. Me. 2006).

222. *Id.* at 190–91 ("[B]y using KaZaA to make copies of the Motion Pictures available to thousands of people over the internet, Defendant violated Plaintiffs' exclusive right to distribute the Motion Pictures.").

223. No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007).

single footnote.²²⁴ In addition, most cases not cited in *Howell* that have concluded that there is a making-available right have given the issue no more than cursory review. In *Elektra Entertainment Group, Inc. v. Perez*,²²⁵ the court simply concluded that the plaintiff had sufficiently alleged that the defendant had made the copyrighted works available, with no analysis or support.²²⁶ In *Atlantic Recording Corp. v. Anderson*,²²⁷ the court stated that “it is self-evident” that making-available violates the distribution right.²²⁸ It came to this reasoning by equating publication with distribution, citing *Harper & Row*.²²⁹

Similarly, in denying a making-available right, *Atlantic Recording Corp. v. Brennan*²³⁰ allocated the issue two sentences in which it concluded that making-available was “problematic,” citing a passage from William Patry’s copyright treatise and *Perfect 10* as support.²³¹ On the whole, however, most decisions denying a making-available right have offered more thorough analysis than those recognizing a making-available right.²³² *Thomas* itself dealt squarely with the issue in a nineteen-page opinion.²³³

C. WIPO Treaty Obligations

Part II.A examined the statutory text of the Act, and Part II.B analyzed the key court of appeals cases, as well as district court decisions interpreting

224. *Id.* at *3 n.38 (making its determination “based on its reading of the statute, the important decision in *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), and the opinion offered by the Register of Copyrights, Marybeth Peters”).

225. No. 05-931, 2006 WL 3063493 (D. Or. Oct. 25, 2006).

226. *See id.* at *2 (“[P]laintiffs’ Amended Complaint alleges that defendant used an online media distribution system, among other things, to make the copyrighted recordings available for distribution to others. Additionally, plaintiffs’ Amended Complaint refers to ‘Exhibit B’ attached to the complaint, which allegedly represents music files being shared by user ‘perez@KaZaA’ at the time plaintiffs’ investigator conducted the investigation. Although defendant disagrees that Exhibit B is such a representation, I must construe all allegations in the light most favorable to plaintiffs. I find that Exhibit B, in the context of the allegations in the Complaint, supports plaintiffs’ allegation that defendant made copyrighted materials available for distribution.”). Note also that this decision was made with very little at stake: the RIAA proposed to dismiss the case without prejudice, while the defendant wanted to dismiss the case with prejudice. *See id.* at *1–4.

227. No. H-06-3578, 2008 WL 2316551 (S.D. Tex. Mar. 12, 2008).

228. *Id.* at *8 (“[I]t is self-evident that Defendant’s actions in placing Plaintiffs’ Copyrighted Recordings in a shared folder accessible to numerous other persons on KaZaA constituted a ‘distribution’ for the purposes of Plaintiffs’ copyright infringement claim against Defendant.”).

229. *Id.* at *7.

230. 534 F. Supp. 2d 278 (D. Conn. 2008).

231. *Id.* at 281–82 (citing *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007); 4 PATRY, *supra* note 101, § 13:9 & n.10 (2007)).

232. *See, e.g.*, *Venegas-Hernández v. Asociación de Compositores y Editores de Música Latinoamericana*, 424 F.3d 50, 57–59 (1st Cir. 2005) (3 pages); *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981–85 (D. Ariz. 2008) (5 pages); *Elektra Entm’t Group, Inc. v. Barker*, 551 F. Supp. 2d 234, 239–47 (S.D.N.Y. 2008) (7 pages); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 166–75 (D. Mass. 2008) (10 pages); *Obolensky v. G.P. Putnam’s Sons*, 628 F. Supp. 1552, 1555 (S.D.N.Y. 1986) (3 paragraphs).

233. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1210–28 (D. Minn. 2008).

those cases. Part II.C presents arguments relating to the WIPO treaties. Part II.C.1 introduces the RIAA's argument that international treaties require that the United States recognize a making-available right. Part II.C.2 then examines whether federal government interpretations of the Act are consistent with international treaties that demonstrate that there is a making-available right.

1. WIPO Treaties

The RIAA argued in *Thomas* that the two WIPO treaties recognizing a making-available right (WCT and WPPT) are significant because to conclude that § 106(3) does not include a making-available right would conflict with international obligations.²³⁴ The defendant's amici countered that international treaties are not self-executing, meaning that participating nations need to pass their own domestic laws to enact the provisions, and therefore they are not controlling.²³⁵ Even if the WIPO treaties create a making-available right, § 106(3) is arguably only concerned with identifying what rights give rise to a damages remedy (i.e., WIPO treaties may create a making-available right without recourse to a remedy of damages).²³⁶

The PFF and MPAA argue that the "Charming Betsy" rule of statutory construction should control, where a statute should not be interpreted to conflict with international treaties if any alternative interpretation is plausible.²³⁷ They argue that this rule respects the principles of separation of powers and comity by preventing the judiciary from interfering with the President's and Congress's exclusive powers²³⁸ and by allowing the President and Congress to uphold their international treaty obligations.²³⁹ William Patry, an author of one of the leading copyright treatises, responded that the "Charming Betsy" rule only applies when a statute is ambiguous, and is "merely a canon of construction."²⁴⁰ In what became a

234. See Plaintiffs' Supplemental Brief, *supra* note 72, at 26–28.

235. See Professors' Brief, *supra* note 137, at 9 n.1 (noting that the World Intellectual Property Organization (WIPO) treaties, like all intellectual property treaties, are not self-executing in the United States).

236. Defendant's Second Memorandum, *supra* note 132, at 13 ("All that the Copyright Act does is confer a set of very specific exclusive rights that if infringed permits a remedy of damages, statutory or actual.").

237. MPAA Brief, *supra* note 136, at 4 (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."); see also PFF Brief, *supra* note 136, at 11 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or an international agreement of the United States." (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 114 (1987))).

238. See PFF Brief, *supra* note 136, at 12.

239. *Id.* at 13.

240. The Patry Copyright Blog, MPAA's Brief and the Charming Betsy, <http://williampatry.blogspot.com/2008/06/mpaas-brief-and-charming-betsy.html> (June 24, 2008, 10:50 EDT).

heated debate, the RIAA argued that Patry's argument derived from a conflict of interest.²⁴¹

In *Thomas*, Judge Davis found that the treaties are not self-executing and therefore not binding.²⁴² Regarding the "Charming Betsy" rule, Judge Davis wrote that the RIAA's understanding of the distribution right is "simply not reasonable."²⁴³ Because of a lack of ambiguity, then, the "Charming Betsy" rule need not be invoked in the analysis.

2. Government Interpretation of U.S. Laws as Compliant with WIPO Treaties

The RIAA argued in response that the fact that the treaties are not self-executing is "beside the point," and that they are important instead because they demonstrate that Congress, the President, and other executive agencies considered the issue "head-on"²⁴⁴ and concluded that there is a making-available right.²⁴⁵ The RIAA quoted Bruce Lehman, U.S. Patent and Trademark Office (PTO) Commissioner speaking at a House Committee Hearing, saying that "nothing in these Treaties or implementing legislation affects the issue of liability for particular acts of copyright infringement."²⁴⁶ Also quoted was Alan Larson, Assistant Secretary of State, saying "the Department of State unequivocally endorses the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty."²⁴⁷ The House Judiciary Committee was also quoted: "[t]he treaties do not require any change in the substance of copyright rights or exceptions in U.S. law."²⁴⁸ The RIAA argued that Congress passed the

241. Plaintiffs' Reply Brief, *supra* note 207, at 9 n.4 ("Mr. Patry's antipathy for the making-available right is well known and may derive from his role as Senior Copyright Counsel to Google, which has litigated this issue against copyright owners.").

242. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1226 (D. Minn. 2008) ("The WIPO treaties are not self-executing and lack any binding legal authority separate from their implementation through the Copyright Act. . . . Therefore, the fact that the WIPO treaties protect a making-available right does not create an enforceable making-available right for Plaintiffs in this Court." (citing 17 U.S.C. § 104(c), (d); *Medellin v. Texas*, 128 S.Ct. 1346, 1365 (2008); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 137 (2d Cir. 2005)).

243. *Id.*

244. See Plaintiffs' Supplemental Brief, *supra* note 72, at 27.

245. Plaintiffs' Reply Brief, *supra* note 207, at 13 ("The WIPO treaties are relevant because in the course of determining whether existing law satisfied the treaties' requirements, Congress, the President, and other Executive agencies concluded that the Copyright Act does protect the making-available right.").

246. *Id.* at 27 n.10 (quoting *WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. 37 (1997) (statement of Bruce A. Lehman, Assistant Secretary of Commerce and Comm'r of Patents and Trademarks)).

247. *Id.* (quoting *WIPO Copyright Treaty (WCT) (1996) and WIPO Performances and Phonograms Treaty (WWPT) (1996)*, S. EXEC. REP. NO. 105-25, at 29 (1998) (statement of Alan Larson, Assistant Secretary of State)).

248. *Id.* at 27 (alteration in original) (quoting *WIPO Copyright Treaties Implementation And On-Line Copyright Infringement Liability Limitation*, H.R. REP. NO. 105-551(1), at 9 (1998)).

implementation bill based on the executive agencies' assurances that the Act complied with the treaties,²⁴⁹ and that they therefore interpreted the Act as including a making-available right.

The opinions of the Copyright Office, the administrative agency responsible for the execution of the Act, are also relevant.²⁵⁰ The plaintiffs quoted Marybeth Peters, Register of Copyrights, as saying "[a]fter an extensive analysis the Copyright Office concluded that existing protections are adequate to fulfill all but two of the substantive treaty obligations," and neither of those were related to the making-available right.²⁵¹ She further stated that the implementation bill "fully and adequately implements the obligations of the [new WIPO] treaties."²⁵² Most importantly, Peters wrote that "making [a work] available for other users of [a] peer to peer network to download . . . constitutes an infringement of the exclusive distribution right."²⁵³ As the recording companies argued, "[t]hat interpretation is entitled to particular respect."²⁵⁴ Notably, the very Supreme Court case the RIAA cited as support stated that "[a]lthough we would ordinarily give weight to the [agency's] interpretation of an ambiguous statute . . . we . . . do not rely on it in this instance."²⁵⁵ Despite the fact that lower courts have disagreed on statutory interpretation, the EFF argued that § 106(3) is in no way ambiguous,²⁵⁶ and therefore the opinion of the Register of Copyrights is irrelevant.

D. *Proposed Alternatives to Making-Available*

Part II.C presented arguments relating to WIPO treaties. Part II.D surveys alternatives to a making-available right. Part II.D.1 explains that in addressing the making-available right, there may be a role for "tolerated

249. See *id.* ("Relying on this testimony, Congress implemented the treaties in full.").

250. *Great N. Ry. Co. v. United States*, 315 U.S. 262, 275 (1942) ("Also pertinent to the construction of the Act is the contemporaneous administrative interpretation placed on it by those charged with its execution.").

251. Plaintiffs' Supplemental Brief, *supra* note 72, at 27 (quoting *WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. 43–44 (1997) (statement of Marybeth Peters, Register of Copyrights)).

252. *Id.* at 27–28 (alteration in original) (quoting *WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. 43 (1997) (statement of Marybeth Peters, Register of Copyrights)).

253. *Id.* at 9 (quoting Letter from Marybeth Peters, Register of Copyrights, to Rep. Howard L. Berman, Subcomm. on Courts, the Internet and Intellectual Prop. 1 (Sept. 25, 2002), reprinted in *Piracy of Intellectual Property on Peer-to-Peer Networks, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 114 (2002)).

254. *Id.* (citing *De Sylva v. Ballentine*, 351 U.S. 570, 577–78 (1956)).

255. *De Sylva v. Ballentine*, 351 U.S. 570, 577–78 (1956).

256. See EFF Brief, *supra* note 137, at 6 ("The distribution right encompasses only the distribution of *certain things* ('copies or phonorecords'), to *certain people* ('the public'), in *certain ways* ('by sale or other transfer of ownership, or by rental, lease, or lending').").

use,” where not all legally infringing uses are prosecuted by copyright owners. In addition, Part II.D.2 explains that it appears as though many judges have accepted that making-available may be considered as circumstantial evidence of infringement as part of the overall infringement claim, rather than as direct evidence of infringement on its own. Part II.D.3 surveys international case law with regard to filesharing and the making-available right. Part II.D.4 looks at proposed and enacted international legislation to address making-available and filesharing. Finally, Part II.D.5 presents a proposed agreement in the United States between the RIAA and ISPs to enforce copyright by denying Internet access to individuals who violate copyright.

1. Tolerated Use

Professor Tim Wu argues that, in practice, many copyright infringements are just not enforced, leading to “tolerated use”: “a system that declares many inoffensive activities illegal, with the tacit understanding that the law will usually not be enforced, leaving sanctions hanging overhead like copyright’s own Sword of Damocles.”²⁵⁷ Wu argues that fan websites are often tolerated because many copyright owners see this type of infringement as a good thing.²⁵⁸ He also says that “suing adolescents who worship your product may not be the ideal way to promote the product.”²⁵⁹ Professor Lawrence Lessig concurs and argues that the RIAA lawsuits are “rendering a generation criminal.”²⁶⁰

The argument, then, is that courts should acknowledge and adapt to society’s values, which to date have tolerated certain types of infringing use. Timothy Lee of the Cato Institute argues that, historically, copyright has regulated the commercial use of works and that to allow noncommercial filesharing would be consistent with the history of copyright law.²⁶¹ He says that only since filesharing has arrived has noncommercial use threatened the content industry’s existence.²⁶² He proposes, then, that copyright law focus on commercial actors, who are easier to regulate and

257. Tim Wu, *Tolerated Use: The Copyright Problem*, SLATE, Oct. 16, 2007, <http://www.slate.com/id/2175730/entry/2175731/>.

258. *Id.*

259. *Id.*

260. Lawrence Lessig, *Don’t Make Kids Online Crooks*, U.S. NEWS & WORLD REP., Dec. 22–29, 2008, at 15.

261. Timothy B. Lee, *Two Paths for Copyright Law*, CATO INSTITUTE, June 11, 2008, <http://www.cato-unbound.org/2008/06/11/tim-lee/two-paths-for-copyright-law/>

(“[L]egalization of non-commercial filesharing looks less like a radical departure from copyright’s past, and more like an incremental adjustment to technological change.”). “Mix tapes and libraries of recorded movies may have been technically illegal, but Hollywood and the major labels recognized that they weren’t a big enough threat to their bottom line to be worth suing customers over.” *Id.*

262. *Id.* (“But as the 21st century dawned, technological progress brought this latent ambiguity in copyright law into stark relief. Peer-to-peer filesharing transformed non-commercial home copying from a minor nuisance to an existential threat to the recording industry.”).

possess more resources to cope with complex copyright laws.²⁶³ In *Thomas*, Judge Davis seemed to agree in principle, stating that the damage award was excessive for noncommercial use.²⁶⁴

To avoid the “Sword of Damocles” potential liability with “tolerated use,” Creative Commons advocates a spectrum of rights. Rather than all or nothing, they offer an option for “some rights reserved.”²⁶⁵ Owners are in control: copyright owners describe which uses are infringing and which are not. This arguably avoids “fostering disdain for copyright protection”²⁶⁶ where society does not respect copyright laws.²⁶⁷ Lessig advocates striking a proper “balance between anarchy and control” so that creativity is not inordinately restricted by laws.²⁶⁸

2. Circumstantial Evidence

As pointed out in a recent article,²⁶⁹ courts may consider the making-available of files as circumstantial evidence together with other evidence to support an inference of infringement. In *Thomas*, Judge Davis agreed.²⁷⁰

263. *Id.*

264. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1228 (D. Minn. 2008) (“Her status as a consumer who was not seeking to harm her competitors or make a profit does not excuse her behavior. But it does make the award of hundreds of thousands of dollars in damages unprecedented and oppressive.”). Presumably Judge Michael J. Davis would be even more alarmed at the retrial verdict of \$1,920,000. *See supra* note 142 and accompanying text.

265. *See* About Creative Commons, www.creativecommons.org/about/what-is-cc (last visited Oct. 19, 2009) (“Creative Commons defines the spectrum of possibilities between full copyright and the public domain. From *all rights reserved* to *no rights reserved*. Our licenses help you keep your copyright while allowing certain uses of your work — a ‘some rights reserved’ copyright.”).

266. *MGM Studios Inc. v. Grokster*, 545 U.S. 913, 929 (2005) (citing Tim Wu, *When Code Isn’t Law*, 89 VA. L. REV. 679, 724–26 (2003)); *see also* Lessig, *supra* note 260, at 15 (“[Our kids] get used to being criminal. This fact is deeply corrosive. As with Prohibition, it is profoundly corrupting. And over time, it will only weaken our kids’ respect for the law.”).

267. *See* Lessig, *supra* note 260, at 15 (“A concerted campaign by rights holders, politicians, school administrators, and increasingly parents has convinced kids that their behavior violates the law. But that law breaking continues.”).

268. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 3 (Landscape Letter ed. 2004), available at http://www.jus.uio.no/sisu/free_culture.lawrence_lessig/landscape.letter.pdf.

269. Robert Kasunic, *Making Circumstantial Proof of Distribution Available*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1145 (2008).

270. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1225 (D. Minn. 2008) (“[D]irect proof of actual dissemination is not required by the Copyright Act. Plaintiffs are free to employ circumstantial evidence to attempt to prove actual dissemination.”).

Howell recognized this possibility,²⁷¹ and *London-Sire Records, Inc. v. Doe I*²⁷² said explicitly that where direct evidence is impossible to produce, a “chain of inferences” is permitted.²⁷³ *Arista Records, Inc. v. MP3Board, Inc.*²⁷⁴ did not find that making-available was infringement because the “record companies had not shown that proof of particular instances of use by the public was ‘impossible to produce.’”²⁷⁵ Even *Hotaling* can be viewed in this light: Patry said that *Hotaling* can be best defended as a decision based on “evidentiary probability.”²⁷⁶

3. International Case Law

Internationally, courts have had varying approaches to the making-available right. In Hong Kong, a man was criminally convicted of illegally distributing copyrighted movies by placing the files in a share folder on a filesharing network.²⁷⁷ The court found that “[t]his was not merely ‘making available’ the BitTorrent files. These were positive acts by the defendant, leading to the distribution of the data. He intended that result.”²⁷⁸ The “positive acts” included creating images of the inlay cards and imprinting them with his logo, publishing the file availability on a newsgroup, and keeping his computer connected to enable others to download.²⁷⁹ Interestingly, Hong Kong’s statute does not directly define “distribution” either, but the lower court found no ambiguity in the terms of the statute.²⁸⁰ On appeal, the court quoted *Hotaling* and emphasized that the defendant “had done all that was necessary to fulfill the criteria for distribution.”²⁸¹ On final appeal, the court found that the defendant’s computer made a copy of the file before sending it via the Internet to downloaders and that this in the aggregate was distribution, rather than making-available. This also settled the question of whether or not a

271. See *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 983 (D. Ariz. 2008) (“As *Hotaling* seems to suggest, evidence that a defendant made a copy of a work available to the public might, in conjunction with other circumstantial evidence, support an inference that the copy was likely transferred to a member of the public.”). On its own, though, making-available “only shows that the defendant attempted to distribute the copy, and there is no basis for attempt liability in the statute, no matter how desirable such liability may be as a matter of policy.” *Id.* at 984.

272. 542 F. Supp. 2d 153 (D. Mass. 2008).

273. *Id.* at 177 (“In considering this question, the Court must keep in mind that transfers on a peer-to-peer network are not observable by outside users. To show infringement, the plaintiffs are obliged to build a chain of inferences.”).

274. No. 00 CIV. 4660(SHS), 2002 WL 1997918 (S.D.N.Y. Aug. 29, 2002).

275. *Howell*, 554 F. Supp. 2d at 983 (quoting *MP3Board*, 2002 WL 1997918, at *4).

276. See *id.* at 984 (“The majority’s decision [in *Hotaling*] can be saved only if it is read to rest on an evidentiary probability that there had been an actual loan of the copy.”) (quoting PATRY, *supra* note 101, at 13-15)).

277. *HKSAR v. Chan Nai Ming*, [2005] 4 H.K.L.R.D. 142 (Magistrates’ Court).

278. *Id.* at 151.

279. *Id.*

280. *HKSAR v. Chan Nai Ming*, [2007] 1 H.K.L.R.D. 95, 100 (C.F.I.).

281. *Id.* at 108–09.

“transfer” had taken place, and whether the file was a “copy.”²⁸² The court used an analogy of a coin-operated soft drink vending machine, where the operator has taken all the steps necessary to sell, but the buyer must insert the money and the machine itself, rather than the operator, delivers the drink: the operator has still distributed the drink, even though the machine itself physically delivers the drink to the buyer.²⁸³

Some jurisdictions have permitted downloading (taking a file from the filesharing network), but not uploading (making-available). In Canada, the Copyright Board has ruled that downloading is legal, but uploading is not.²⁸⁴ This in part led the RIAA to add Canada to its “Priority List.”²⁸⁵ After a recent ruling, the Netherlands no longer permits downloading of illegal copies of copyrighted materials.²⁸⁶ One pretrial ruling in Spain has determined that private sharing between users of a filesharing network without profit does not violate copyright laws,²⁸⁷ thereby lending support to Timothy Lee’s view that noncommercial use should be permitted.²⁸⁸

With regards to filesharing network operators rather than individuals, Australia had its own KaZaa case,²⁸⁹ which was decided similarly to *Grokster*.²⁹⁰ The Pirate Bay was also held liable in a recent trial in

282. *HKSAR v. Chan Nai Ming*, [2007] 2 H.K.L.R.D. 489, 501 (C.F.A.) (“[T]he evidence showed that upon being accessed by downloaders seeking to obtain a copy of the relevant film, the appellant’s computer reproduced the infringing electronic copy (which remained on his hard disk) in the form of packets of digital information which were sent to the downloaders and reassembled by their computers in the correct sequence to constitute an entire infringing copy of that film. In my view, that process in aggregate is aptly described as involving the appellant’s creation of infringing electronic copies (transient or otherwise) of the film and their distribution directly or indirectly to each member of each swarm.”); *see also id.* at 506 (holding that even if no copy was made on the original computer, “[t]he fact would remain that by his use of technology the appellant had caused reproductions of the infringing copies on his computer to appear on the computers of the downloaders, even if the process did not involve the prior creation by his computer of an electronic copy (transient or otherwise)”).

283. *Id.* at 505.

284. *See* John Borland, *Canada Deems P2P Downloading Legal*, CNET NEWS, Dec. 12, 2003, http://news.cnet.com/2100-1025_3-5121479.html (“‘As far as computer hard drives are concerned, we say that for the time being, it is still legal,’ said Claude Majeau, secretary general of the Copyright Board.”).

285. *See* Press Release, RIAA, Congressional International Anti-piracy Caucus Releases Priority Country (May 15, 2008), <http://www.riaa.com/newsitem.php?id=7D79DA80-38AB-6667-121C-16FE883BD080>.

286. Tom Sanders, *Dutch Court Rules Against Law That Allowed File Downloading*, PC WORLD, June 27, 2008, <http://www.pcworld.idg.com.au/index.php/id;1262747976> (“The Netherlands currently have a unique legal situation where downloading of copyrighted materials is allowed and only uploading is forbidden. The judge now ruled that when the original source is illegal, any copies too should be considered illegal.”).

287. Posting of Enigmax to TorrentFreak, <http://torrentfreak.com/judge-rules-p2p-legal-sites-to-be-presumed-innocent-090707> (July 7, 2009).

288. *See supra* notes 261–63 and accompanying text.

289. *Universal Music Austl. Pty. Ltd. v Sharman License Holdings Ltd.* (2005) 220 A.L.R. 1 (Fed. Ct. Austl.).

290. The Federal Court of Australia held that KaZaa had “authorized” infringement, similar to the “inducement” test in *Grokster* and that it could have taken steps to control or limit the copyright infringement but chose not to. *Id. passim*; *see also* Jane Ginsburg & Sam

Sweden.²⁹¹ In the Netherlands, however, a 2003 Dutch Supreme Court ruling held that KaZaa was not responsible for the actions of its users because it found that it was not technically possible for KaZaa to control infringement, in stark contrast with *Grokster*.²⁹² Promusicae, RIAA's Spanish counterpart, brought a case against Pablo Soto, the creator of several filesharing software programs, alleging that he made the software available for infringing use.²⁹³

4. International Legislation

Many argue that legislatures, rather than courts, should make this delicate decision as to whether there is a making-available right.²⁹⁴ Thomas-Rasset argues that "if there is a problem with the Copyright Act, Congress must fix it."²⁹⁵ Sony said that courts generally have deferred to Congress to address copyright issues arising from new technology.²⁹⁶

Canada, for one, has recently tabled a bill²⁹⁷ to amend its Copyright Act which explicitly creates a making-available right by tracking the language of the WIPO treaties and makes clear that filesharing is an infringing use.²⁹⁸

Ricketson, *Inducers and Authorisers: A Comparison of the US Supreme Court's Grokster Decision and the Australian Federal Court's KaZaa Ruling*, 11 MEDIA & ARTS L. REV. 1 (2006), <http://ssrn.com/abstract=888928>. Australia's Full Federal Court similarly decided a case dealing with "mp3s4free.net." See *Cooper v Universal Music Austl. Pty. Ltd.* (2006) 156 F.C.R. 380, 389 (Fed. Ct. Austl.) ("[A] person's power to prevent the doing of an act comprised in a copyright includes the person's power not to facilitate the doing of that act by, for example, making available to the public a technical capacity calculated to lead to the doing of that act. The evidence leads to the inexorable inference that it was the deliberate choice of Mr Cooper to establish and maintain his website in a form which did not give him the power immediately to prevent, or immediately to restrict, internet users from using links on his website to access remote websites for the purpose of copying sound recordings in which copyright subsisted.").

291. See Glenn Peoples, *Web Reaction: The Pirate Bay Verdict*, BILLBOARD.BIZ, Apr. 17, 2009, http://www.billboard.biz/bbbiz/content_display/industry/e3if46ca983d59bcb8fafafd6defa697d4.

292. *Eiseressen/Kazaa B.V., Hoge Raad der Nederlanden* [HR] [Supreme Court of the Netherlands], 19 december 2003, L.J.N. AN7253, AMI 2004 1, p. 9 (Neth.), available at http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ijn&ijn=AN7253&u_ljn=AN7253, translated at http://web.archive.org/web/20070710033653/http://www.solv.nl/rechtspraak_docs/KaZaa+v.+Buma+Stemra+-+Supreme+Court+19+December+2003.pdf; see also Associated Press, *Dutch Court Throws out Kazaa Case*, WIRED, Dec. 19, 2003, <http://www.wired.com/entertainment/music/news/2003/12/61672>.

293. See Posting of Jon Healey to Bit Player, <http://opinion.latimes.com/bitplayer/2008/06/so-1999-music-c.html> (June 5, 2008).

294. See, e.g., DRAEKE WESEMAN, *FUTURE SHOCK AND THE COPYRIGHT ACT OF 1976: IS MERELY MAKING A COPYRIGHTED WORK AVAILABLE FOR DIGITAL TRANSMISSION A VIOLATION OF § 106(3)?*, at 25 (2008), available at http://www.wired.com/images_blogs/threatlevel/files/future_shock_making_available.pdf ("Congress needs to revisit the Copyright Act of 1976 to address the digital distribution capabilities of the Internet.").

295. See Defendant's Reply Brief, *supra* note 69, at 2.

296. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) (explaining that courts have shown "consistent deference to Congress when major technological innovations alter the market for copyrighted materials").

297. Bill C-61, 2008, 2d Sess., 39th Parl. (Can.), available at http://www2.parl.gc.ca/content/hoc/Bills/392/Government/C-61/C-61_1/C-61_1.PDF.

In Europe, most proposed legislation looks to ISPs to enforce copyright controls. France has enacted a “three strikes” law to mandate that ISPs withdraw Internet services for third-time offending copyright infringers.²⁹⁹ The first version of the proposed law passed the French Senate, but was ruled unconstitutional since the adjudicating administrative body would have presumed guilt.³⁰⁰ A second version of the law that leaves final adjudication to the judiciary³⁰¹ has been enacted.³⁰²

The European Union has rejected imposing “three strikes” laws across Europe, saying that it would deny basic civil rights of citizens.³⁰³ Germany rejected “three strikes” laws due to anticipated clashes with privacy laws,³⁰⁴ and Spain has stated that it will also not consider “three strikes” or other punitive laws against filesharers.³⁰⁵ Similarly, in Denmark, ISPs rejected a “three strikes” system proposed by the record companies.³⁰⁶

In Britain, the government forced ISPs and content owners to the negotiating table with the threat that if they did not resolve it themselves, the government would impose a solution.³⁰⁷ The BPI, the RIAA’s British counterpart,³⁰⁸ coordinated the signing of a “memorandum of understanding” with six of the leading ISPs to send warning letters to users

298. *Id.* § 7(1.1)(d); see also *id.* § 9(1.1)(a) (“[T]o communicate it to the public by telecommunication in a way that allows a member of the public to access it from a place and at a time individually chosen by that member of the public.”).

299. See Aymeric Pichevin, *French Assembly Adopts Anti-piracy Bill*, BILLBOARD.BIZ, Sept. 15, 2009, http://www.billboard.biz/bbbiz/content_display/industry/e3ibe685b1031a7a6fcc69386c2b5bc7ef9; see also *Trois Strikes and You’re Out*, ECONOMIST, Apr. 18, 2009, at 72; Charles Bremner, *Download Pirates Face Being Banned from the Internet Under Sarkozy Law*, TIMES (London), June 19, 2008, at 39, http://technology.timesonline.co.uk/tol/news/tech_and_web/article4165519.ece.

300. Jacqui Cheng, *French “3 Strikes” Law Returns, Now with Judicial Oversight!*, ARS TECHNICA, July 10, 2009, <http://arstechnica.com/tech-policy/news/2009/07/its-baack-french-3-strikes-law-gets-another-go-from-senate.ars>.

301. *Id.*

302. See Pichevin, *supra* note 299 and accompanying text.

303. *French Pirates Face Net Cut-Off*, BBC NEWS, Nov. 3, 2008, <http://news.bbc.co.uk/2/hi/technology/7706014.stm>. The European Union was scheduled to consider a report that suggested such a “graduated response” plan, however. Posting of Ernesto to TorrentFreak, <http://torrentfreak.com/eu-plots-pirate-bay-ban-and-piracy-clampdown-090201/> (Feb. 1, 2009).

304. *Trois Strikes and You’re Out*, *supra* note 299; Jacqui Cheng, *Germany Says “Nein” to Three-Strikes Infringement Plan*, ARS TECHNICA, Feb. 6, 2009, <http://arstechnica.com/tech-policy/news/2009/02/germany-walks-away-from-three-strikes-internet-policy.ars>.

305. Howell Llewellyn, *‘Three-Strikes’ off Anti-piracy Agenda in Spain*, BILLBOARD.BIZ, June 22, 2009, http://www.billboard.biz/bbbiz/content_display/industry/e3i8071e0d9c25cb6b876d3771fb7e3d102.

306. See Posting of Enigmax to TorrentFreak, <http://torrentfreak.com/danish-isps-reject-anti-piracy-proposals-080917> (Sept. 17, 2008).

307. See Andrew Orlowski, *Legal, British P2P ‘By End of Year,’* REG., June 26, 2008, http://www.theregister.co.uk/2008/06/26/music_service_provider_talks/.

308. See BPI, <http://www.bpi.co.uk/category/about-us.aspx> (last visited Oct. 19, 2009) (“The BPI [formerly known as British Phonographic Industry] is the representative voice of the UK recorded music business.”).

that the BPI has identified as infringing.³⁰⁹ A BPI representative said that “all ISPs now recognise their responsibility to help deal with illegal filesharing.”³¹⁰ In October 2008, the British ISPs were to begin sending warning letters to users when given evidence that the users had made files available.³¹¹ Despite earlier hints from David Lammy, the United Kingdom’s intellectual property minister, that three strikes was not “the right road to go down,”³¹² “three strikes” legislation has recently been proposed by the U.K. government.³¹³

The Isle of Man has proposed something entirely different. A “blanket license” has been proposed where Internet users pay a nominal fee (roughly \$1.38 monthly) as part of their Internet access charges and the money is paid to copyright owners by a special collections agency.³¹⁴ Users would then be permitted to perform unlimited downloads of music³¹⁵ and presumably would also be able to make music available without copyright liability.

The Irish Recorded Music Association (IRMA), the RIAA’s Irish counterpart, has initiated lawsuits against major Irish ISPs in an effort to establish a de facto “three strikes” policy without legislation.³¹⁶ Earlier in 2009, Ireland’s largest ISP agreed to carry out a “three strikes” policy.³¹⁷

309. Robert Ashton, *BPI Strikes Deal with ISPs To Reduce Filesharing*, MUSICWEEK, July 24, 2008, <http://www.musicweek.com/story.asp?sectioncode=1&storycode=1034936>.

310. *Id.*

311. Robert Ashton, *ISPs Start Sending Warning Letters*, MUSICWEEK, Oct. 2, 2008, <http://www.musicweek.com/story.asp?sectioncode=1&storycode=1035706> (quoting language from earlier warning letters that said the following: “We’re writing to you about downloading and sharing of copyrighted files on the internet. That’s because we’ve received a report that copyrighted music has been shared using a computer linked to your Virgin Media Internet account.” (internal quotation marks omitted)); see also Chris Williams, *BT Starts Threatening Music Downloaders with Internet Cut-Off*, REG., June 26, 2008, http://www.theregister.co.uk/2008/06/26/bt_bpi_letter/print.html (quoting a warning letter from BPI forwarded to an individual by a British ISP that said the following: “The sound recordings in that directory have then been made available to other members of the public via your internet connection. This is an infringement of the copyright in those sound recordings.”).

312. Richard Wray, *Internet Pirates Beware: This Man Is Out To Stop You*, OBSERVER (London), Apr. 26, 2009, Business at 9, available at <http://www.guardian.co.uk/media/2009/apr/26/david-lammy-illegal-downloads-piracy>.

313. Associated Press, *U.K. Mulls Cutting Pirates’ Web Access*, WALL ST. J., Aug. 26, 2009, at B5; Nate Anderson, *UK Caves to Big Content, Backs ‘Net Cutoffs for P2P Use*, ARS TECHNICA, Aug. 25, 2009, <http://arstechnica.com/tech-policy/news/2009/08/uk-caves-to-big-content-supports-net-cutoffs-for-p2p-use.ars>.

314. Eric Pfanner, *A Fix for Music Piracy: Tack a Fee on Broadband*, N.Y. TIMES, Jan. 26, 2009, at B4.

315. *Id.*

316. Andre Paine, *Major Labels Sue Irish ISPs*, BILLBOARD.BIZ, June 23, 2009, http://www.billboard.biz/bbbiz/content_display/industry/e3i4bd3d37ca0da05dc91c93065eba16a94.

317. Posting of David Kravets to Wired Threat Level Blog, *ISP Agrees To Ban Copyright Scofflaws*, <http://www.wired.com/threatlevel/2009/01/isp-agrees-to-b/> (Jan. 29, 2009, 11:56 EST).

In 2006, much like Lessig,³¹⁸ Swedish Prime Minister Fredrik Reinfeldt said that “we should not hunt a generation.”³¹⁹ Despite this, Sweden passed a law that allows copyright owners to request suspected file-sharer IP addresses from ISPs and pursue individuals directly with a court order.³²⁰ A Spanish European Court of Justice decision permits member states to pass legislation requiring ISPs to disclose identifying user information.³²¹ But as one observer stated, the decision requires that legislation must respect the European Community general principle of proportionality.³²²

In the South Pacific, New Zealand, after an initial “three strikes” legislation proposal met heavy resistance, is considering a new version of such legislation.³²³ The “three strikes” consist of (1) notice from the ISP to the alleged infringer following a complaint to the ISP from the content owner, (2) cease-and-desist letter from the ISP, and (3) official infringement notice from the content owner by obtaining the alleged infringer’s contact information from a Copyright Tribunal.³²⁴ Australia is considering a “three strikes” law, but is hoping for an industry-led solution following consultation.³²⁵ The government has also proposed that ISPs act as a filter and block access to “illegal” sites as determined by the government, but it appears that ISPs are not cooperating.³²⁶

In Asia, South Korea has passed a “three strikes” law.³²⁷ This law gives the government discretion to shut down infringing websites for up to six

318. See *supra* note 260 and accompanying text.

319. Jan Libbenga, *Sweden Judges Back Pirate Hunter Act*, REG., Nov. 14, 2008, http://www.theregister.co.uk/2008/11/14/sweden_closer_to_antipiracy_law/. Similarly, Norway’s Minister of Education has voiced opposition to tactics fighting filesharing. Jacqui Cheng, *Norway Education Minister: There’s No Future in Fighting P2P*, ARS TECHNICA, Feb. 24, 2009, <http://arstechnica.com/tech-policy/news/2009/02/norway-education-minister-theres-no-future-in-fighting-p2p.ars>.

320. Libbenga, *supra* note 319; *Sweden Passes Anti-P2P, Anti-fileshare Law*, P2PNET, Feb. 26, 2009, <http://www.p2pnet.net/story/18636>.

321. See Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, 2008 E.C.R. I-00271, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0275:EN:NOT>.

322. *EU: ECJ Renders Judgment in Promusicae Case*, EUR. PRIVACY & E-COM. ALERT (Hunton & Williams, Brussels, Belg.), Apr. 2008, at 1, available at http://www.hunton.com/files/tbl_s10News/FileUpload44/15171/EU_Commerce_Alert_April_2008.pdf (stating that the law “must strike a fair balance between the fundamental rights that they protect, and must respect general principles of Community law, such as the principle of proportionality”).

323. John Ferguson, *New Zealand Govt Revives Anti-piracy Law*, BILLBOARD.BIZ, July 14, 2009, http://www.billboard.biz/bbbiz/content_display/industry/e3ia62deb261008854a5b1cb008385467b6.

324. *Id.*

325. Ben Grubb, *Conroy Vows To Tackle Illegal File Sharing*, ITNEWS, July 15, 2009, <http://www.itnews.com.au/News/150133,conroy-vows-to-tackle-illegal-file-sharing.aspx>.

326. Asher Moses, *Labor Plan To Censor Internet in Shreds*, AGE, Dec. 9, 2008, <http://www.theage.com.au/news/home/technology/labor-plan-to-censor-internet-in-shreds/2008/12/09/1228584820006.html>.

327. Kim Tong-Hyung, *Upload a Song, Lose Your Internet Connection*, KOREA TIMES, Apr. 5, 2009, http://www.koreatimes.co.kr/www/news/tech/2009/04/133_42594.html.

months and to deny user Internet access.³²⁸ Taiwan has also passed a “three strikes” law where ISPs are only permitted to pass on the identity of alleged infringers if the individual user makes a request to restore previously removed content.³²⁹

On a global scale, the Anti-Counterfeiting Trade Agreement (ACTA) is currently being considered to modify international intellectual property laws.³³⁰ “Three strikes” and ISP content filtering does not appear to be proposed, but filesharing by individual users without profit may still be subject to criminal sanctions where the sharing is on a “commercial scale.”³³¹

5. ISPs: Copyright Cops

Recently it has been reported that the RIAA will not initiate any new lawsuits against individuals.³³² Instead, apparently with the help of the Attorney General of New York, the RIAA has struck a modified “three strikes” deal with ISPs in the United States, similar to the “three strikes” law in France.³³³ Crucially, the RIAA will notify ISPs to warn users when they have made files available.³³⁴ This then still maintains the making-available claim and could be challenged in court.³³⁵ At least one ISP refused to cooperate with the plan, saying that it is “not a cop and [it] doesn’t work for free,” and has asked for a billing address whenever it has received a warning from the RIAA.³³⁶ Verizon, a major ISP in the United

328. *Id.*

329. Thibault Worth, *Taiwan Passes Three-Strikes Piracy Law*, BILLBOARD.BIZ, Apr. 27, 2009, http://www.billboard.biz/bbbiz/content_display/industry/e3ib20649ac4d6059c2acd520f678899fad.

330. Nate Anderson, *ACTA Draft Leaks: Nonprofit P2P Faces Criminal Penalties*, ARS TECHNICA, Feb. 4, 2009, <http://arstechnica.com/tech-policy/news/2009/02/actual-acta-draft-leaks-noncommercial-p2p-could-get-criminal-penalties.ars>.

331. *Id.*

332. See McBride & Smith, *supra* note 54.

333. *Id.* (“Depending on the agreement, the ISP will either forward the note to customers, or alert customers that they appear to be uploading music illegally, and ask them to stop. If the customers continue the file-sharing, they will get one or two more emails, perhaps accompanied by slower service from the provider. Finally, the ISP may cut off their access altogether.”). Ray Beckerman, a prominent attorney for individual defendants against the RIAA, asked “what was the legal basis for the NYS Attorney General involvement in this coordinated agreement among 4 competitors, and 2 separate industries?” Recording Industry vs The People, http://recordingindustryvspeople.blogspot.com/2009_01_01_archive.html#929883912691581798 (Jan. 1, 2009, 09:53 EST).

334. See Greg Sandoval, *Copy of RIAA’s New Enforcement Notice to ISPs*, CNET NEWS, Dec. 19, 2008, http://news.cnet.com/8301-1023_3-10127050-93.html (“We believe a user on your network is offering an infringing sound recording for download through a peer to peer application.”).

335. See Posting of David Kravets to Wired Threat Level Blog, <http://blog.wired.com/27bstroke6/2008/12/analysis-riaa-s.html> (Dec. 22, 2008, 14:19 EST).

336. Greg Sandoval, *One ISP Says RIAA Must Pay for Piracy Protection*, CNET NEWS, Dec. 22, 2008, http://news.cnet.com/8301-1023_3-10127841-93.html.

States,³³⁷ has not yet agreed to participate in the “graduated response plan” and an agreement is “still being hashed out.”³³⁸ AT&T, another major ISP,³³⁹ has stated that it will not cut off a customer’s Internet access without a court order.³⁴⁰ Comcast, also a major ISP,³⁴¹ has stated that it does not plan to participate in a “three strikes” policy.³⁴² One observer wrote that this is a work-in-progress and the RIAA’s goal of “ISP unanimity” is unachievable.³⁴³

III. THE FREE JAMMIE MOVEMENT

Suing every teenager cannot be the answer. It is hard to believe that the RIAA honestly thinks that users read and adhere to their iTunes software license agreement³⁴⁴ when over half of the music on an average teenager’s iPod has been illegally obtained.³⁴⁵ The RIAA has apparently abandoned its mass litigation strategy for enforcement through ISPs.³⁴⁶ But it has not abandoned its legal claim: making-available is the basis for asking ISPs to take action against individuals.³⁴⁷

Part III.A argues that a making-available right is not necessary for copyright owners to enforce their rights against infringers. Part III.B then argues that the statutory text of the Act and case law do not support the RIAA’s argument that there is a making-available right. Finally, Part III.C argues that international treaties and legislation are also unconvincing in the argument for a making-available right.

337. See Alex Goldman, *Top 23 U.S. ISPs by Subscriber: Q3 2008*, ISP-PLANET, Dec. 2, 2008, <http://www.isp-planet.com/research/rankings/usa.html>.

338. Nate Anderson, *RIAA Graduated Response Plan: Q&A with Cary Sherman*, ARS TECHNICA, Dec. 21, 2008, <http://arstechnica.com/news.ars/post/20081221-riaa-graduated-response-plan-qa-with-cary-sherman.html>; see also *Any There There? RIAA Agreements Remain Flimsy, Unconfirmed . . .*, DIGITAL MUSIC NEWS, Jan. 4, 2009, <http://www.digitalmusicnews.com/stories/122208riaa/view> (explaining that “one of the largest ISPs, Verizon, told Digital Music News that a sweeping, stepped-up agreement with the RIAA simply does not exist,” but that “AOL, Comcast, and Charter Communications representatives indicated that accounts will be terminated if copyrighted materials are shared over their networks”); Posting of David Kravets to Wired Threat Level Blog, <http://blog.wired.com/27bstroke6/2009/01/draft-verizon-o.html> (Jan. 5, 2009, 11:43 EST) (investigating whether any ISPs had agreed to the plan, but unable to find any ISPs that would admit having agreed to the plan).

339. See Goldman, *supra* note 337.

340. Greg Sandoval, *AT&T Exec: ISP Will Never Terminate Service on RIAA’s Word*, CNET NEWS, Mar. 25, 2009, http://news.cnet.com/8301-1023_3-10204514-93.html.

341. See Goldman, *supra* note 337.

342. ComcastBonnie, *This Is Our Official Statement about the RIAA Stuff!*, TWITPIC, Mar. 26, 2009, <http://twitpic.com/2gq3y>.

343. See *Any There There? RIAA Agreements Remain Flimsy, Unconfirmed . . .*, *supra* note 338 (“[T]his is part of an admitted work-in-progress by the RIAA, and any hope of ISP unanimity is probably too elusive to be true.”).

344. See *supra* note 32 and accompanying text.

345. See *supra* note 34 and accompanying text.

346. See *supra* note 64 and accompanying text; *supra* Part II.D.5.

347. See *supra* notes 334–35 and accompanying text.

A. Making-Available Is Not Necessary

The RIAA's most persuasive equitable appeal for a making-available right is that actual distribution over filesharing networks is impossible to prove.³⁴⁸ It is not clear that this is true.³⁴⁹ Regardless, the RIAA does not need a making-available right in order to defend against infringement. *Thomas* was not alone in finding that distribution to the RIAA's investigator was evidence of actual distribution.³⁵⁰ Also, *Thomas* pointed out that the RIAA has other options available: the uploader violates the reproduction right when making a copy to share and is vicariously liable, as in *Grokster*, where inducing others to copy.³⁵¹ The RIAA may also pursue downloaders for violating the reproduction right.³⁵² Importantly, it appears as though a lower court consensus is emerging that making-available may be considered as circumstantial evidence to establish an infringement claim.³⁵³ This appears to be a middle-ground solution that accommodates the RIAA's equitable evidentiary concern that was raised in *Hoteling*, yet still adheres to statutory law.

B. The Statutory Text and Case Law Do Not Support Making-Available

Because copyright is a statutory law, the making-available debate has properly centered on the Act.³⁵⁴ There is no making-available right explicitly in the Act,³⁵⁵ so if one is to be found, it must be found implicitly. First, it is not credible to argue that distribution and publication are synonymous³⁵⁶ because of similar sentence construction.³⁵⁷ It is difficult to imagine that Congress intended the identical result, but did not choose identical statutory wording. In addition, *Harper & Row* was about the right of first publication rather than defining distribution or publication.³⁵⁸ Second, *Tasini* made clear that a digital file is a "copy or phonorecord" as required for an infringement claim under the Act.³⁵⁹ Although not technically a "transfer of ownership" since a copy has not changed hands for rental, lease or lending, courts seem to have taken a common-sense position that digital transmission is a transfer of ownership as required for an infringement claim under the Act.³⁶⁰ Third, the RIAA's strongest statutory argument is that there is a separate right "to authorize"

348. See *supra* Part I.B.1.

349. See *supra* notes 74–75 and accompanying text.

350. See *supra* notes 71, 121–23 and accompanying text.

351. See *supra* note 146 and accompanying text.

352. See *supra* note 146 and accompanying text.

353. See *supra* Part II.D.2.

354. See *supra* notes 82–88 and accompanying text.

355. See *supra* notes 95–96 and accompanying text.

356. See *supra* Part II.A.1.

357. See *supra* notes 150–51 and accompanying text.

358. See *supra* notes 155–57 and accompanying text.

359. See *supra* notes 174–75 and accompanying text.

360. See *supra* notes 176–80 and accompanying text.

distribution.³⁶¹ Despite the ordinary meaning of “to do and to authorize” in the statute,³⁶² lower courts that have directly considered the question have been nearly unanimous that this statutory language was intended to enable vicarious liability rather than to create a separate “authorization” right.³⁶³ *Tasini* raises questions, however, since the Supreme Court seemed to directly hold that authorizing distribution was sufficient to infringe.³⁶⁴ However, since it was clear in *Tasini* that infringing reproduction took place, it is plausible that the *Tasini* comment dealt only with vicarious rather than direct liability for distribution.³⁶⁵ Lower courts will likely adhere to previous precedents until the Supreme Court rules directly on the issue.

There is little precedential support for a making-available right. Although it might be hyperbole to claim that “the great weight of authority” finds against a making-available right,³⁶⁶ it is certainly a fiction for the RIAA to claim that there are “decades of case law” on point.³⁶⁷ The original and primary case law precedent for making-available is *Hotaling*, from the Fourth Circuit.³⁶⁸ *Hotaling* has been heavily criticized as being essentially a policy decision to avoid an inequitable result, in contradiction to statutory language without precedential support.³⁶⁹ If the single line from *Napster* in the Ninth Circuit ever did support a making-available right, it was later explicitly overruled in *Perfect 10*.³⁷⁰ *National Car Rental*, from the Eighth Circuit, never ruled directly on the issue of a making-available right, but did quote a treatise saying that actual dissemination was required.³⁷¹ This was convincing enough for Judge Davis in *Thomas* to hold that the comment was not dictum and therefore there is no making-available right.³⁷² Perhaps most importantly, the majority of lower courts that have considered this issue directly and thoroughly have decided that there is no making-available right.³⁷³ *Hotaling* and single-sentence analyses³⁷⁴ are insufficient to claim a substantial support in order to come to a confident decision. It is arguable that courts found the making-available right to be so obvious that explanation was not necessary. Still, *Thomas* is likely to be persuasive with other district courts. It is one of only two cases to date that have conducted a full jury trial,³⁷⁵ with a thorough

361. See *supra* Part II.A.2.

362. See *supra* note 158 and accompanying text.

363. See *supra* notes 162–65 and accompanying text.

364. See *supra* note 168 and accompanying text.

365. See *supra* notes 170–71 and accompanying text.

366. See *supra* note 219 and accompanying text.

367. See *supra* note 80 and accompanying text.

368. See *supra* notes 81–84 and accompanying text.

369. See *supra* Part II.B.1.

370. See *supra* Part II.B.2.

371. See *supra* Part II.B.3.

372. See *supra* notes 209–11 and accompanying text.

373. See *supra* Part II.B.4.

374. See *supra* note 222 and accompanying text.

375. See *supra* note 111 and accompanying text.

briefing from both sides specifically on the making-available issue,³⁷⁶ resulting in a comprehensive and well-articulated opinion.³⁷⁷

*C. International Treaties and Legislation Do Not Support
Making-Available*

The RIAA's international treaty arguments are unconvincing. The RIAA seemingly conceded that the denial of a making-available right will not bring the United States into conflict with its international obligations when in its reply brief it said that this is "beside the point."³⁷⁸ International treaties are not self-executing, and § 106(3) does not necessarily abrogate any rights under the two WIPO treaties.³⁷⁹ This effectively defuses the argument. Similarly, the RIAA did not cite any proof that the President, executive agencies, or Congress affirmatively considered "head-on"³⁸⁰ whether there was indeed a making-available right. The RIAA quoted only judgments that there was no conflict between the Act and the WIPO treaties.³⁸¹ The PTO Commissioner said that nothing in the treaties "affects the issue of *liability*."³⁸² This, if anything, instead supports Thomas-Rasset's position, arguing that the treaties do not create any new liability for making-available.³⁸³ A Secretary of State's "unequivocal[] endorse[ment]"³⁸⁴ is more of a public relations statement than a legal interpretation. Finally, the Copyright Office stated that the Act is "adequate to fulfill . . . the substantive treaty obligations,"³⁸⁵ and the House Judiciary Committee judged that the treaties do not require any change in the Act.³⁸⁶ These are both general statements about the treaties and Act as a whole, but neither directly addresses the making-available right. The strongest statement on making-available came from Marybeth Peters, the Register of Copyrights, who said that there is a making-available right.³⁸⁷ However, this opinion is advisory, and not binding on courts.³⁸⁸ In sum, the WIPO treaties and the related governmental hearings provide little support for a making-available right.

As a whole, then, in the United States there is currently no making-available right, but making-available may be considered as circumstantial evidence. Internationally, the case most on point was in Hong Kong, where an individual uploader's "positive acts," such as posting availability on a

376. See *supra* notes 132–37 and accompanying text.

377. See *supra* note 233 and accompanying text.

378. See *supra* note 244 and accompanying text.

379. See *supra* notes 235–36, 242 and accompanying text.

380. See *supra* note 244 and accompanying text.

381. See *supra* Part II.C.2.

382. See *supra* note 246 and accompanying text (emphasis added).

383. See *supra* note 236 and accompanying text.

384. See *supra* note 247 and accompanying text.

385. See *supra* note 251 and accompanying text.

386. See *supra* note 248 and accompanying text.

387. See *supra* note 253 and accompanying text.

388. See *supra* note 255 and accompanying text.

website and maintaining an Internet connection were sufficient to find infringement.³⁸⁹ In other words, making-available might not be as passive as it sounds, and it might be closer to *Grokster*'s vicarious liability "inducement" trigger for a finding of infringement.³⁹⁰ If intent to induce others to infringe is strong enough, making-available together with an intent to induce may be sufficient to find liability, or at least sufficient to preclude summary judgment. To date, however, in the United States, the "inducement" standard has only applied in vicarious liability situations such as in *Grokster*, and not for direct liability for infringing distribution. As a result, it would be unlikely for any court other than the Supreme Court to apply this standard to a § 106(3) infringement claim.

As many have suggested, a legislative solution may be required.³⁹¹ To date, only Canada has proposed legislation that directly creates a making-available right.³⁹² France's "three strikes" approach to recruiting ISPs to police copyright and withdraw individuals' Internet access³⁹³ seems to have spread to the United States.³⁹⁴ Two major issues remain with the ISP approach, however: (1) the legal claim is still that there is a making-available right,³⁹⁵ which would likely fail if challenged in court and (2) ISPs may not agree to cooperate, which has been seen already.³⁹⁶

CONCLUSION

Jammie Thomas-Rasset feels as though she is part of a group of individuals who are being bullied by the RIAA and want to fight back—a "Free Jammie" movement.³⁹⁷ Currently, many individuals believe that filesharing is illegal, but they do it anyway.³⁹⁸ This might be due in part to the culture of the Internet,³⁹⁹ but this still amounts to blatant disregard for the law. Fundamentally, laws must reflect society's values or some form of anarchy will ensue—lawmakers cannot render a generation criminal.⁴⁰⁰ "Tolerated use" is not a solution, nor is it law: it is only an observation of behavior that is a stop-gap measure and cannot continue indefinitely.⁴⁰¹ Either society's values, or the law, must change. The making-available debate is one important part of this evolution.

As debate over the legislation continues in the absence of a Supreme Court opinion on the making-available right, a strong contingent of the

389. See *supra* notes 277–83 and accompanying text.

390. See *supra* note 51 and accompanying text.

391. See *supra* notes 294–95 and accompanying text.

392. See *supra* notes 297–98 and accompanying text.

393. See *supra* note 299 and accompanying text.

394. See *supra* Part II.D.5.

395. See *supra* notes 334–35 and accompanying text.

396. See *supra* notes 336–43 and accompanying text.

397. See *supra* note 119 and accompanying text.

398. See *supra* note 61 and accompanying text.

399. See *supra* notes 12–17 and accompanying text.

400. See *supra* note 260 and accompanying text.

401. See *supra* Part II.D.1.

lower courts appears to favor the conclusion that there is no making-available right in the context of filesharing and individual users. These courts agree, however, that making-available can be considered as circumstantial evidence of infringement of the § 106(3) distribution right.